Study B-700 April 8, 1997

## Memorandum 97-22

### SB 143 — Unfair Competition Litigation

We have received quite a lot of reaction to Senate Bill 143, introduced by Senator Kopp to implement the Commission's recommendation on *Unfair Competition Litigation*. Attached to this memorandum are letters sent to the Senate Judiciary Committee and to Senator Kopp and the Commission in anticipation of a hearing on SB 143 (now postponed). Earlier letters from several groups that have been superseded are not reproduced in the exhibit. A current copy of SB 143 is also attached.

	Exhibit pp.
1.	SB 143 (Kopp), as amended in Senate, April 2, 1997
2.	Draft Report on SB 143 (revised comments) 7
3.	Association for California Tort Reform (John H. Sullivan & Barbara M. Wheeler), April 1, 1997
4.	California District Attorneys Association (Lawrence G. Brown), March 6, 1997
5.	California Retailers Association (William E. Dombrowski), March 10, 1997
6.	California Rural Legal Assistance Foundation (Mark S. Schacht), March 8, 1997
7.	Chevron (J.J. Coffey), April 2, 1997
8.	Consumer Attorneys of California (David S. Casey, Jr.), March 27, 1997
9.	Consumers Union (Earl Lui), March 4, 199731
10.	Consumers Union (Earl Lui), March 18, 199734
11.	Dial Corporation (Brenda E. Nuite), April 3, 1997
12.	Livingston & Mattesich — State Farm Insurance Companies (Gene Livingston), March 7, 1997
13.	Personal Insurance Federation of California (Dan C. Dunmoyer, Phyllis Marshall & Diane Colborn), March 6, 1997
14.	Public Counsel (Kenneth W. Babcock & Kathleen A. Michon), April 2, 1997
15.	State Bar of California (cover letter) (Larry Doyle), April 7, 1997 45
16.	State Bar of California, Legal Services Section (Kathleen A. Michon), April 1, 1997
17.	SB 1309 (Mountjoy)
18.	AB 1295 (Caldera), as amended April 1, 1997

### Status of Bill

Senate Bill 143 is now set for hearing on May 13. It was originally set for March 11, but we put the bill over until April 8 in order to work on issues raised in several of the letters (or earlier versions of them) included in the exhibit. The Senate Judiciary Committee has now rescheduled the hearing so that SB 143 can be heard with SB 1309 (Mountjoy), which is part of the Governor's legislative package. (A copy of SB 1309 is in the Exhibit at pp. 55-59.) As things now stand, this will provide the Committee with a fairly clear policy choice.

A third bill — AB 1295 (Caldera), as amended April 1, 1997 — would require traditional standing, apply class action rules, and provide a broad binding effect. (A copy of AB 1295 is in the Exhibit at pp. 61-66.)

As things now stand, the support and opposition on SB 143 are as follows:

Support — California District Attorneys Association, Consumers Union

Support if amended — Association for California Tort Reform

Technical comments — State Bar Legal Services Section

Cannot support in current form — California Retailers Association

Oppose unless amended — California Rural Legal Assistance Foundation,

Consumer Attorneys of California, Dial Corporation, Public Counsel

**Oppose** — State Farm Insurance Companies

We do not intend to rehearse in this memorandum all of the issues that have been repeatedly considered by the Commission over the last two years, but a number of points are noted here and additional matters may be raised orally at the meeting. The staff suggests consideration of several issues and seeks the Commission's guidance on what direction the bill should take and how we can best preserve its core provisions. If either of the other bills (SB 1309 and AB 1275) passes, then the Commission's bill will not be needed, but until that happens, the staff believes it is important that SB 143 retain its distinct character as a balanced approach that makes the minimum changes needed to put unfair competition representative actions on a sound footing to the ultimate benefit of both sides to litigation as well as the general public.

### **Reports of Problems in Existing Law**

The Commission will recall that at one point continuation of this study was in doubt because of the lack of reports that any problems existed. Setting the bill for hearing has elicited a number of responses highly critical of the existing law. See, e.g., Exhibit pp. 9 ("severe and growing problem with private civil actions"), 14 ("desire to reduce frivolous suits"), 35 ("hit with meritless lawsuits under the Act in the last couple of months"), 37 ("excesses in the UCA"), 38 ("unjustified and unwarranted suits being brought against the business community").

### **Concerns of Defense and Business Groups**

Bill doesn't go far enough. Industry and business representatives believe that the bill should go much farther, requiring traditional standing or imposing full class action rules, and providing for a broader binding effect. See Exhibit pp. 9-10, 14-15, 18, 35, 37, 38. As noted above, two other bills in the current session take this sort of approach and there is no need for the Commission's bill to do the same thing. The Legislature is better served by having alternative policies to choose from. The approaches suggested by these commentators have been considered at past Commission meetings and for a variety of reasons, the Commission did not decide to pursue the class action model. The issue was addressed most recently at the December 12, 1996, meeting in Los Angeles.

Bill will result in more actions. The duty of defendants to give notice of similar representative, enforcement, or class actions is criticized as encouraging plaintiffs to pile on. See, e.g., Exhibit p. 14. Note that Section 17304 requires notice of actions "known to the defendant" — consequently, complaints to the effect that the defendant may not know of the other actions are misdirected. This section is not crucial to the bill, but the staff does not believe that a careful reading of it would lead anyone to think it requires impossible compliance. Providing notice is the first step in working to consolidate or coordinate actions that are appropriate for such treatment. Mandating consolidation, as one commentator has suggested, does not appear workable. We would prefer to rely on existing general procedures.

Bill will complicate settlement. Several commentators think SB 143 will complicate settlement by providing too broad a notice, inviting intervention through the fairness hearing process, and delaying the process too long. See, e. g., Exhibit pp. 9-10, 15, 37, 39. These problems may be real, but they should be offset by the benefits of the procedure which should cut down on harassing, unfounded actions and give more respect to stipulated judgments. Of course, the procedure does not apply to pre-filing settlements, so if defendants want to settle without interference from the due process provisions in SB 143, that practice would not be threatened. We cannot think of a way to move unfair competition

representative actions toward procedural respectability while avoiding notice and hearing.

### **Concerns of Public Interest Groups and Private Litigators**

The Commission has fully considered and responded to many of the concerns raised by public interest groups and plaintiffs bar representatives over the course of preparing its recommendation. As discussed below, several amendments were made to address these concerns and some other amendment could be made to deal with additional problems if it would remove the opposition. However, it is impossible to satisfy all of the concerns of CRLA, CAOC, and Pubic Counsel without undoing what the bill seeks to accomplish and threatening the balance we have sought to achieve throughout this study. For example, CAOC continues to oppose the bill primarily because it does not apply the notice and fairness hearing procedure to public prosecutors. (See Exhibit pp. 28-30.) The Commission considered this issue at two recent meetings and the staff does not believe it should be reopened at this point. Furthermore, even if the Commission were interested in pursuing this concept, it should be the subject of a different bill than SB 143. CAOC could sponsor legislation of this type, if it wanted. Put simply, this is not that bill and that issue is not inherently related to the problems addressed in SB 143. Furthermore, to adopt the CAOC suggestion (however it would be implemented) would not gain CAOC support of SB 143 and would result in active opposition from the California District Attorneys Association.

### **Amendments of April 2**

SB 143 was amended on April 2 to eliminate three major sources of concern with the bill — the plaintiff's adequacy standard in Section 17302(a), the limited binding effect rule in Section 17308, and the semi-retroactive effect rule in Section 17311 — and also to make a technical revision in Section 17301 (see Exhibit p. 34).

Adequacy standard. The Commission added a provision to Section 17302(a) at the December 1996 meeting requiring that a private plaintiff must be an adequate representative of the interests of the general public pled, but did not go as far as urged (and as provided in the other bills) and require that the plaintiff have suffered an injury by the practice complained of. This limitation was adopted in the spirit of compromise that has guided the Commission from the early days of this study. However, the plaintiffs bar and public interest representatives (except for Consumers Union) did not accept the compromise and continued to object

while at the same time the defense and business bar objected that the rule did not go far enough and that the "no injury" rule should not be codified. Since no one seemed to appreciate the compromise, the staff prepared amendments to take it out and return the recommendation to the form it had during most of 1996. This approach was approved by Chairperson Fink and Vice Chairperson Byrd. The Comment to Section 17302 should be amended as set out in the draft Report on Exhibit p. 8. It bears repeating that those who urge full class action standing and typicality rules have bills they can actively support and we would hope that they can be neutral on SB 143 in the interim.

Binding effect. The limited binding effect rule in Section 17308 has not been well understood. It has also been a frequent target of complaint although the staff firmly believes, along with Prof. Fellmeth, that it is a sensible rule that states what the proper result would be. We also believe that the section is ultimately unnecessary, no matter how useful it is. Res judicata effect cannot be imposed where it would be unconstitutional to do so and the courts will find binding effect were it is appropriate. Section 17308 provided a nudge to the courts, avoiding the necessity to litigate the matter. The staff's analysis in earlier memorandums concluded that it would most likely be unconstitutional to provide a broader binding effect than set out in Section 17308, although where restitutionary relief is "incidental" to injunctive relief, there appears to be some leeway. But we are fairly confident that a representative action cannot bind members of the general public who have not had notice and an opportunity to opt out. The staff also believes that by providing the new rules on pleading, notice, and the fairness hearing that the SB 143 procedure will lead to binding effect in appropriate cases under general principles. Section 17308 was making no friends; its elimination does not threaten the core principles of the bill (CAOC to the contrary notwithstanding) and gains support from Consumers Union (see Exhibit pp. 31-33). Accordingly, the staff recommended eliminating Section 17308. This approach was approved by Chairperson Fink and Vice Chairperson Byrd. The Commission should consider whether the Comment to Section 17306 (fairness hearing) should be revised to add a sentence to the effect that these rules should improve the status of representative actions so that the courts will grant appropriate res judicata effect under general rules.

Limited retroactivity. As introduced, SB 143 could apply to actions pending on its operative date if the parties substantially complied with the procedure. A number of persons objected to this rule and the staff recommended making the

new procedure prospective only. This change was approved by Chairperson Fink and Vice Chairperson Byrd and Section 17311 has been amended accordingly and the Comment revised as set out on Exhibit page 8.

### What's Next

The staff will continue to work with the interested persons. There may be some additional minor or technical changes that can reduce opposition to the bill, but almost all of the suggested amendments simply trade one group's opposition for another's with no net gain politically and a loss to the core integrity of the Commission's recommendation. We hope that those who oppose SB 143 mainly because it doesn't go far enough can take a neutral position and not attempt to forestall reasonable, compromise reforms just because they don't solve all of the problems perceived in existing law. We hope too that plaintiffs representatives can come to recognize that the balanced approach taken by Commission does not threaten their legitimate interests and soften or remove their opposition.

Respectfully submitted,

Stan Ulrich Assistant Executive Secretary

### AMENDED IN SENATE APRIL 2, 1997

#### SENATE BILL

No. 143

### Introduced by Senator Kopp

January 13, 1997

An act to add Chapter 6 (commencing with Section 17300) to Part 2 of Division 7 of the Business and Professions Code, relating to unfair competition litigation.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 143, as amended, Kopp. Unfair competition litigation: representative actions.

Existing law prohibits unlawful, unfair, or fraudulent business acts or practices and unfair, deceptive, untrue, or misleading advertising. Existing law provides that relief for violations of these provisions may be obtained by the Attorney General, district attorneys, county counsels, city attorneys, and city prosecutors, as specified, or by certain other parties, including a person acting for the person's interests or on behalf of the general public. Available remedies under these laws are cumulative, and generally include injunctive relief, civil penalties, and restitution.

This bill would require unfair business practice actions brought by private parties on behalf of the *interests of the* general public ("representative actions") to comply with certain requirements. The bill would require a private plaintiff to be an adequate representative of the interests of the general public and would provide that the private plaintiff may not have a conflict of interest with the interests of the general public. The bill would also require the plaintiff's

attorney to be an adequate representative of the interests of the general public. These matters would be determined by the court, and the representative cause of action would be stricken from the complaint if these requirements are not satisfied, as specified.

The bill would also require the private plaintiff to provide notice of the representative action to the Attorney General and to the district attorney of the county where the action is pending. The defendant would be required to notify the plaintiff and the court of any other related actions pending in this state against the defendant.

The bill would also require the plaintiff to notify specified persons prior to entry of judgment or modification of judgment with respect to a final determination of the action, and would require a court hearing to determine if various requirements have been satisfied. A judgment approved by the court under these provisions would bar any further actions on representative causes of actions brought by private plaintiffs against the defendant based on substantially similar facts and theories of liability.

The bill would also provide that if a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, a court may stay the representative action, make an order for consolidation or coordination of the actions, or make any other order, in the interest of justice.

The bill would provide that its provisions apply to actions commenced after December 31, 1997.

The bill includes other related provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Chapter 6 (commencing with Section
- 2 17300) is added to Part 2 of Division 7 of the Business and
- 3 Professions Code, to read:

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### CHAPTER 6. REPRESENTATIVE ACTIONS ON BEHALF OF **PUBLIC**

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17300. As used in this chapter:

- (a) "Enforcement action" means an action prosecutor under Chapter 5 (commencing with Section 17200) or Part 3 (commencing with Section 17500).
- (b) "Prosecutor" means the Attorney General or counsel, city appropriate district attorney, county attorney, or city prosecutor.
- (c) "Representative cause of action" means a cause of action asserted by a private plaintiff on behalf of the general public under Section 17204 or 17535.
- private plaintiff 17301. (a) A may plead representative cause of action on behalf of the interests 16 of the general public under Section 17204 or 17535 only if the requirements of this chapter are satisfied.
- (b) The private plaintiff shall separately state the 19 representative cause of action in the pleadings, and shall 20 designate it as being brought "on behalf of the interests of the general public" under Section 17204 or 17535, as 22 applicable.
- 17302. (a) A private plaintiff in a representative 24 action must be an adequate representative of the interests of the general public pled and may not have a 26 conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. The private plaintiff is not required to have sustained any injury by the defendant.
- 30 attorney for a private plaintiff (b) The adequate 31 representative action must be an legal representative of the interests of the general public pled. 32
- (c) On noticed motion of a party or on the court's own 33 34 motion, the court shall determine by order whether the 35 requirements of subdivisions (a) and (b) are satisfied. 36 The determination may be based on the pleadings. The 37 court may inquire into the matters in its discretion or may permit discovery. In making its determination, the court shall consider standards applied in class actions. If the 40 court determines that the requirements of subdivisions

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(a) and (b) are not satisfied, the representative cause of action shall be stricken from the complaint.

- 3 order under this subdivision may (d) An 4 conditional, and may be modified before judgment in the 5 action.
- (e) This section does not preclude the court from 6 preliminary 7 granting appropriate relief before determination is made under subdivision (c). 8

9 17303. Within 10 days after commencement of a the private plaintiff shall 10 representative action, notice of the action and of any application for preliminary relief, together with a copy of the complaint, to the 13 Attorney General and to the district attorney of the 14 county where the action is pending. Notice of 15 application for preliminary relief shall be given in the same manner as notice is given to the defendant. 16

17304. (a) Promptly after summons is served on the 18 defendant in an enforcement action or representative action, the defendant shall notify the plaintiff and the 19 20 court of any other enforcement actions, representative actions, or class actions pending in this state against the 21 defendant that are based on substantially similar facts and theories of liability and that are known to the defendant.

(b) Promptly after summons is served on the representative enforcement action, defendant in an action, or class action in this state, the defendant shall give notice of the filing to the plaintiff and the court in all pending enforcement actions and representative actions in this state against the defendant that are based on 29 substantially similar facts and theories of liability and that are known to the defendant. 31

17305. (a) With respect to a representative cause of action, at least 45 days before entry of a judgment, or any 33 34 modification of a judgment, which is 35 determination of the representative cause of action, the 36 private plaintiff shall give notice of the proposed terms of 37 the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for a hearing on

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1 entry of the judgment or modification, to all of the 2 following:

(1) The Attorney General.

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- 4 (2) The district attorney of the county where the 5 action is pending.
- 6 (3) Other parties with cases pending against the 7 defendant based on substantially similar facts and 8 theories of liability known to the plaintiff.
- 9 (4) Each person who has filed with the court a request 10 for notice of the terms of judgment.
  - (5) Other persons as ordered by the court.
- 12 (b) A person given notice under subdivision (a) or any 13 other interested person may apply to the court for leave 14 to intervene in the hearing provided by Section 17306. 15 Nothing in this subdivision limits any other right a person 16 may have to intervene in the action.
- 17 (c) On motion of a party or on the court's own motion, 18 the court for good cause may shorten or lengthen the time 19 for giving notice under subdivision (a).
- 17306. (a) With respect to a representative cause of action, before entry of a judgment, or any modification of a judgment, which is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.
- 26 (b) At the hearing the court shall consider the showing 27 made by the parties and any other persons permitted to 28 appear and shall order entry of judgment only if the court 29 finds that all of the following requirements have been 30 satisfied:
- 31 (1) The proposed judgment and any stipulations and 32 associated agreements are fair, reasonable, and adequate 33 to protect the interests of the general public pled.
- 34 (2) Any award of attorney's fees included in the 35 judgment or in any stipulation or associated agreement 36 complies with applicable law.
- 37 (3) The private plaintiff satisfies the requirements of subdivision (a) of Section 17302.
- 39 (4) The attorney for the private plaintiff satisfies the 40 requirements of subdivision (b) of Section 17302.

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(5) All other requirements of this chapter have been 1 satisfied.

17307. A representative cause of action may not be dismissed, settled, or compromised without the approval of the court and a determination that the disposition of the representative cause of action is fair, reasonable, and adequate to protect the interests of the general public pled. The court, in its discretion, may set the matter for 9 hearing on notice to persons who would receive notice 10 under Section 17306.

17308. The determination of a representative cause of action brought by a private plaintiff in a judgment approved by the court pursuant to Section 17306 is 14 conclusive and bars any further actions on representative 15 causes of action brought by private plaintiffs against the 16 same defendant based on substantially similar facts and theories of liability.

17309. (a) If a private plaintiff has commenced an action that includes a representative cause of action and 19 prosecutor has commenced an enforcement action against the same defendant based on substantially similar 22 facts and theories of liability, the court in which either action is pending, on motion of a party or on the court's plaintiff's 24 own motion, may stay the private 25 representative cause of action until completion of the 26 prosecutor's enforcement action, may make an order for consolidation or coordination of the actions, or may make 27 28 any other order, in the interest of justice.

- (b) The determination under subdivision (a) may be 30 made at any time during the proceedings and regardless of the order in which the actions were commenced. 31
- 32 (c) Nothing in this section affects any right the plaintiff may have to costs and attorney's fees pursuant to 33 Section 1021.5 of the Code of Civil Procedure or other 35 applicable law.

17310. Notice provided to the Attorney General or a 36 37 district attorney under Section 17303 or 17305 does not 38 impose any duty on the Attorney General or district attorney. The Attorney General or district attorney is not precluded from taking any future action as a consequence <del>-- 7 --</del> **SB 143** 

of not taking action in response to notice or any 1 determination made under Section 17306.

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17311. (a) Except as provided in subdivision (b), this ehapter does not apply to actions pending on its operative date.

(b) If the parties to a representative action commenced before the operative date of this chapter substantially comply with the provisions of this chapter, the substantive rules provided in this chapter apply in the action unless the court determines that application of a 10 particular provision of this chapter would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons. For the 14 purpose of this subdivision, Sections 17301 and 17302 are 15 not applicable and the duty to give notice under Section 16 17303 is satisfied if the notice is given promptly after the operative date of this chapter. This chapter applies to 17 18 actions commenced after December 31, 1997.

# REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON SENATE BILL 143 — UNFAIR COMPETITION LITIGATION

The Comments to sections set out below supersede the Comments to these sections as printed in the Commission's recommendation on *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191 (1996).

## Bus. & Prof. Code § 17302. Absence of conflict of interest and adequate legal representation

Comment. Section 17302 sets forth the prerequisites in a representative action for unfair competition or false advertising of (a) absence of a conflict of interest on the part of the plaintiff and (b) adequacy of counsel to represent the general public. Under subdivision (a), if a plaintiff is pursuing a cause of action as an individual and at the same time is seeking to represent the interests of the general public, it would be appropriate for the court to consider whether the plaintiff can adequately perform this dual role and represent the interests of the general public in good faith. This section does not provide a specific conflict of interest standard applicable to the plaintiff's attorney in the representative action; but lack of conflict of interest is an element of the overall adequacy of counsel standard by analogy with class action law. See, e.g., 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure 1769.1, at 383-84 (1986) & Supp. at 36 (1995).

Subdivision (c) provides the procedure for determining that the requirements of subdivisions (a) and (b) are met. The court is given broad discretion in making its determination, including the power to investigate any issues that arise, and may make an order permitting discovery. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section. See Section 17307(b)(3)-(4) (findings required for entry of judgment).

Subdivisions (c) and (d) are drawn in part from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable to class actions.

See also Section 17300(c) ("representative cause of action" defined).

### Bus. & Prof. Code § 17311. Application of chapter

**Comment.** Section 17311 provides that this chapter applies only prospectively, i.e., to actions filed on or after its operative date (January 1, 1998).

# ASSOCIATION FOR CALIFORNIA TORT REFORM

April 1, 1997

TÖ:

Hon John Burton, Chair

Members, Senate Judiciary Committee

FROM:

John H. Sullivan, President

Barbara M. Wheeler, Legislative Consultan Jubara Wrelek—
SB 143 (Konn)

RE:

SB 143 (Kopp)

Status: Senate Judiciary Committee

Hearing Date: April 8, 1997

ACTR POSITION: SUPPORT IF AMENDED

The Association for California Tort Reform supports if amended SB143 (Kopp). We commend Senator Kopp and the California Law Revision Commission for their attempts to address a severe and growing problem with private civil actions using California's Unfair Competition Act (B&P Code Sections 17200 and 17500). SB 143, which is the final recommendation of the Law Revision Commission, appears to move in the right direction in seeking to curb some of the abusive litigation in this area. However, the bill's provisions do not go far enough and, without amendment, certain of its provisions would exacerbate problems with the current law.

Section 17302(a) permits private representative actions by "adequate" plaintiffs; however, plaintiff need not even be injured to qualify as an "adequate" litigant. This is contrary to wellestablished principles of civil law. While the UCA permits "any person acting for the interests of itself, or of members of the general public" to bring an action for any "unlawful" or "unfair" business practice, the Legislature has yet to define the standard to be applied in bringing such an action. Section 17302 would allow such actions to be pursued in the absence of injury on the part of the plaintiff representing the general public.

We suggest that Section 17302 be amended to provide that a plaintiff would be deemed to be "adequate" if he suffered injury or, in the case of false advertising, was actually misled and relied on the misrepresentation.

The notice requirement in Section 17304 for the defendant to notify the plaintiff and the Court of other actions filed against it on the same theory has many problems. First, it is conceivable a defendant not have been served yet or otherwise be unaware of another similar action against it. Additionally, the existence of prior lawsuits is easily discoverable. Finally, unless the statute is amended to require all representative plaintiffs to pursue a single action, the notice provision invites problems (i.e. copycat lawsuits) where different litigants can intervene, pick on, and hold up settlement. For the above reasons, we would suggest deleting Section 17304.

Honorble John Burton April 1, 1997 Page 2

The notice and 45 day waiting period for settlements contained in Section 17305 invites intervenors into the settlement process, which would have the effect of delaying the settlement. Additionally, the notice provision--followed by an additional 45 day wait-- would serve to perpetuate exposure to multiple suits on the same issue.

Finally, a res judicata effect in private individual UCA actions is a serious flaw which remains wholly unaddressed by this legislation. Currently, Section 17308 only provides conclusiveness for judgments in representative causes of action. However, private individual UCA actions based on the same act or conduct can still be brought against a defendant. A suggested amendment would be that a judgment in a representative action would be res judicata as to any future private UCA action against the defendant based on the same act or course of conduct.

In summary, while SB143 looks at a serious problems, it does not go nearly far enough to curb abusive private UCA lawsuits. Moreover, the bill's provisions regarding settlement will exacerbate problems posed by the UCA by inviting intervenors into the settlement process. We would welcome the opportunity to work with Senator Kopp and/or the Law Revision Commission to explore amendments to the bill which would address these concerns.

cc: Senator Quentin Kopp
Gene Wong, Chief Counsel, Senate Judiciary Committee

Law Revision Commission

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MAR 1 8 1997



# CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

731 K Street, Third Floor \* Sacramento, CA 95814 \* (916) 443-2017

March 6, 1997

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Honorable John L. Burton Chair, Senate Judiciary Committee State Capitol, Room 4074 Sacramento, California 95814

Re: \$B 143 (Kopp) -- SUPPORT

Dear Senator Burton:

The California District Attorneys Association (CDAA) supports Senate Bill 143 (Kopp), the California Law Revision Commission's proposal to make several procedural revisions to the California unfair competition statute. Bus. & Prof. Code §17200 et seq.

## Background to the Law Revision Commission Proposal

The unfair competition statute is of vital concern to every California prosecutor's office. Bus & Prof. Code §17200 is California's "Little FTC Act" — the principal law enforcement tool used by California prosecutors to protect the public from unfair and deceptive business practices. See People v. Pacific Land Research (1977) 21 Cal.3d 683; People v. National Association of Realtors (1981) 120 Cal.App.3d 459.

Section 17200 also provides for private rights of action, including actions brought by private plaintiffs "on behalf of the general public." It is this private plaintiff aspect of the unfair competition statute that is at issue here.

In November 1996 the California Law Revision Commission completed a three-year study of the unfair competition statute, focusing particularly on the issues of standing to represent the "general public" and of finality in such private plaintiff lawsuits.

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Although CDAA believes that problems relating to these issues are infrequent, it is true that 517200 is silent as to qualifications for a private plaintiff seeking to represent the general public and as to the possibility of multiple cases using this "private attorney general" authority. CDAA participated throughout the Commission's two-year hearing process to help identify carefully balanced solutions to these concerns.

The Commission's November 1996 report concludes that modest procedural changes are needed to clarify these issues regarding "representative" actions (as the Commission's proposal terms these private actions seeking to represent the general public). CDAA believes the Commission's proposal, now embodied in SB 143, is a carefully tailored and appropriate means of clarifying private standing to bring these "representative" actions and the finality of such actions.

## 5B 143 and its Effects

### SB 143 would:

- o Require that private plaintiffs and their counsel seeking to represent the general public must meet modest standards of conflict of interest and adequacy as legal representatives;
  - o Require clear pleading of these "representative" causes of action;
- o Require that notice of the commencement of such cases, and of proposed terms of a judgment, be given to the Attorney General and district attorney, as well as parties to similar cases against the defendant;
- o Provide for a fairness hearing to make sure that the judgment in a private representative action is "fair, reasonable and adequate" to protect the interests of the general public;
- o Provide a bar to other private "general public" actions on the settled or resolved cause of action, while not barring any existing individual rights of recovery;
- o Clarify options for the court (including a stay of the private action, or consolidation or coordination, or other such orders) when public and private actions are filed simultaneously.

CDAA believes these provisions will help promote certainty, finality, and fairness in these representative actions.

Private plaintiffs will have to meet minimal standards of adequacy and conflict of interest, but these are modest thresholds which good faith plaintiffs with legitimate public interest motivations will easily meet.

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Hon, John L. Burton March 5, 1997 Page Three

Clear pleading and appropriate notice of such cases will likewise screen out only those plaintiffs with motives or claims which cannot withstand public scrutiny. And the requirement of a fairness hearing to ensure that the interests of the general public are indeed served is no substantive barrier at all to a plaintiff who has obtained a result beneficial to the general public. But such a hearing will effectively prevent bad faith "sell outs" of the public interest.

Similarly, there is fundamental fairness in the idea that defendants who settle or resolve these private attorney general actions, on terms meeting a fairness standard, should have confidence that they will face only one such action.

The unfair competition statute, like its federal counterpart in the FTC Act, is a carefully balanced statute which is important to a wide range of interests in the legal community. While §17200 is the principal law enforcement consumer protection statute in California, it also serves other important public and private functions. Given the clearly beneficial overall record of §17200, there is no evidence to support sweeping change in the law, as the Commission's Report indicates.

However, the Law Revision Commission, after extensive non-partisan study of these questions, has recommended these modest procedural changes to clarify uncertainties in the law.

The California District Attorneys Association believes SB 143 is a thoughtful attempt to balance the interests of plaintiffs, defendants and the public. SB 143 would provide greater clarity and certainty in private representative actions, but would avoid imposing burdens that would make important and legitimate private cases unworkable. The Law Revision Commission has struck an appropriate balance, and SB 143 deserves our support.

Thank you for your courtesy in considering the thoughts of the law enforcement community on this subject.

Very truly yours,

LAWRENCE G. BROWN

Executive Director

pc: The Honorable Quentin L. Kopp



# RETAILERS ASSOCIATION

980 NINTH STREET, SUITE 2100 - SACRAMENTO, CA 95614 (916) 443-1975 - FAX (916) 441-4218

March 10, 1997

Law Revision Commission RECEIVED

MAR 1 0 1997

Honorable Quentin Kopp California State Senate State Capitol Sacramento, California 95814

File:	
I NO	

RE: SB 143

Dear Senator Kopp:

The California Retailers Association has reviewed SB 143, under your authorship. The concerns we have with the bill as introduced are such that we cannot support the bill in its current form. We fully recognize and appreciate the extensive work of those involved in the drafting of this legislation and concur completely with their desire to reduce frivolous suits brought by individuals acting as private attorneys general, and to provide some finality for actions brought under Section 17200 of the <u>Business and Professions Code</u> (all Code references hereafter refer to the B & P Code). Following is a brief summary of the points raised by our members:

- ~ Plaintiff's representative does not have to sustain an actual injury, thus there will be loss likelihood of "typicality" or "commonality" as required for representatives in class actions (17302).
- ~ On what basis does a judge determine if the representative is an "adequate" representative of the general public?
- ··· For a judge to determine adequacy of the representative, the judge may need to conduct discovery. If so, businesses will have to hire attorneys to do discovery and appear at hearings to determine adequacy of plaintiff and plaintiffs counsel.
- ~ Defendant will be required to notify the court of other actions filed, and yet defendant may not know, may not have been served yet, etc. Language should provide for notification to the extent the defendant has knowledge. And, only defendant businesses are required to give notice of other similar actions. Plaintiff is often in a better position to know of other similar actions, particularly if that plaintiff has filed more than one or is filing a "copycat" suit. Thus, plaintiff should also be required to give notice, and the court should coordinate or consolidate (17304).

- ~ We question whether the bill provides true res judicata. There is no res judicata for any action based on the same facts and circumstances except for "representative cause of action" as defined. Businesses can still be subject to multiple suits for the same conduct, through use of other Sections (17308 and 17309).
- Because the bill provides for notice and a 45 day period before a hearing is held on a settlement/judgement, businesses cannot enter into a settlement or judgement without public attention (anyone can request to be listed as an "interested party" and thus be informed of the proposed settlement/judgement). The process of evaluating the adequacy of the settlement opens up the process to intervenors. This provision may be misused by so-called public interest groups or activists to challenge the proposed settlement. Thus, we foresee more hiring of attorneys, added expenses and unnecessary publicity. Lastly on this point, notice of the hearing is yet another burden for the defendant.
- The ambiguity on res judicata and the lack of standards for the court to follow on the adequacy of the representatives or the settlement/judgement will give rise to muddled and detrimental case law decisions for business.

In summary, our member representatives feel SB 143 is ambiguous, will result in more 17200 actions, will not provide finality of actions, and will result in more intervenors in the settlement process. Again, because we acknowledge the intent of the sponsors is to improve the status quo through incremental reform, we are willing to work with you and other sponsors to explore any amendments which could be made to the bill to alleviate our concerns.

Sincerely,

William E. Dombrowski

President

cc: Chris Alrecht, Assistant Director, CLRC
Tom Pappageorge, Los Angeles District Attorney's Office

# California

# Rural Legal

# Assistance

# Foundation

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Mark 5. Schaent Executive Discour

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Senator Quentin Kopp State Capitol, Room 2057 Sacramento, CA. 95814 BY FAX

Law Revision Commission RECEIVED

MAR 1 0 1997

File:

# RE: SB 143 (OPPOSE, UNLESS AMENDED)

## Dear Senator Kopp:

In recent weeks, we have reviewed the Law Revision Commission's recommendation in support of this bill, and have asked our advocates who litigate these cases for our farm worker clients to analyze the bill in light of the Commission's stated concerns. A consensus has emerged here that, overall, the bill will impact negatively on our clients who need protection now and in the future from unlawful business practices. However, we realize that concerns have been raised about "abuses" of litigation under B & P Code § 17200, et seq., and we have endeavored to identify major amendments which, if adopted, would mitigate our concerns and make SB 143 a better bill:

- Provide, and adopt as part of the bill, legislative intent language establishing
  that its purpose is not to convert B & P §17200 "representative" actions into
  another type of "class" action, with all of the traditional procedural limits and
  requirements;
- Develop a standard in §17302 with respect to plaintiff and attorney "adequacy" that provides only that the plaintiffs interests can not be antagonistic, and that the attorney has no conflict of interest;
- Clarify that a failure to give notice under §17303 can not be a basis for dismissing the lawsuit by the plaintiff, but may be a basis for prohibiting the plaintiff from proceeding until proper notice has been given;
- Provide that the provisions of §§17306-17307 that are applicable to private litigants are also applicable to all actions brought by governmental agencies or prosecutors;
- Delete § 17308;
- Amend §17309 to delete the current language and instead allow the court, in the interest of justice, to order consolidation or coordination of actions or to make any other necessary order; and
- Delete the language of §17311 and state that the provisions are not retroactive.

I regret that I am bringing these amendments to your attention only a few days before the bill will be heard in Senate Judiciary, and I apologize for that. Please don't hesitate to contact me if you or your staff have questions about our position on the bill.

Sincerely,

Kal 5. Schacker

Mark S. Schacht Executive Director

16

cc: Senate Judiciary Committee Members

San Francisco Control Rest, Pourty & the Environment Labor & Civil Rights



April 2, 1997

The Chevren Companies 1201 K Street, Suite 1910 Secremente, UA 95814

Jack Coffey Manager Celifornia State Relations Phone 916 441 3636

<u>REVISED</u>

Bill Number:

\$B 143 (Kopp)

Subject:

Unfair Competition Litigation

As Introduced:

January 13, 1997

Position:

Support With Amendments

Law Revision Commission RECEIVED

APR 03 1997

File:
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Mr. Michael Kahl Kahl / Pownall Companies 1115 11th St., Suite 100 Sacramento, CA 95814

Dear Mike:

Chevron supports Senate Bill 143 with amendments.

### Bill Summary

SB 143 would amend the California Unfair Business Practices Act (UBPA) which defines and prohibits unfair competition and deceptive, false or misleading advertising.

### Background

Under the current UBPA, actions may be brought by state and local prosecutors as well as by any private person "acting for the interests of itself, its members or the general public." Such a proceeding is defined as a "representative cause of action." This in effect authorizes private class actions on behalf of groups that may be as large as all of the residents of the state. This creates serious exposure to California businesses.

### Bill Impact

SB 143 would impose a number of sensible restrictions on private representative causes of action. For example, with the enactment of SB 143 the court in such an action would determine



April 2, 1997

16:34

Page 2

whether the plaintiff would be "an adequate representative" of the interests of the group and had no conflict of interest and whether the counsel in the matter was "an adequate legal representative of the interests" of the group represented. Final judgment could not be entered until the court determined that all requirements of the statute had been satisfied and a final judgment would bar further such actions. In addition, a final judgment in a proceeding would bar any further representative causes of action against a defendant for the same conduct.

ROB SAKURAI

### Recommendation

While SB 143 takes some important steps in adding reasonableness to the UBPA, it does not adequately address problems deriving from the possible coexistence of numerous "representative" causes of action against the same defendant based on the same facts and theories. Incorporating existing class action provisions would address that problem.

Therefore, it is Chevron's recommendation that SB 143 be amended to provide that when monetary relief is sought, that aspect of the action should be treated under existing California law as a "class action." This would require that:

- Notice of the action be given to the members of the class.
- Any member be permitted to opt-out of the action; and
- The remaining class members, the plaintiff and the defendant be bound by the final judgment in, or any settlement of, the action.

Specific amendments designed to accomplish the foregoing are detailed on the attached redraft of SB 143.

Sincerely,

J. J. Coffey

FUN for

Attachment

cc: The Honorable Quentin L. Kopp
California Petroleum Resources Group
Mr. D. T. Van Camp

# BILL NUMBER: SB 143 INTRODUCED 01/13/97 BILL TEXT

### INTRODUCED BY Senator Kopp

### JANUARY 13, 1997

An act to add Chapter 6 (commencing with Section 17300) to Part 2 of Division 7 of the Business and Professions Code, relating to unfair competition litigation.

### LEGISLATIVE COUNSEL'S DIGEST

SB 143, as introduced, Kopp. Unfair competition litigation: representative actions.

Existing law prohibits unlawful, unfair, or fraudulent business acts or practices and unfair, deceptive, untrue, or misleading advertising. Existing law provides for relief for violations of these provisions may be obtained by the Attorney General, district attorneys, county counsels, city attorneys, and city prosecutors, as specified, or by certain other parties, including a person acting for the person's interests or on behalf of the general public. Available remedies under these laws are cumulative, and generally include injunctive relief, civil penalties, and restitution.

This bill would require unfair business practice actions brought by private parties on behalf of the general public ("representative actions") to comply with certain requirements. The bill would require a private plaintiff to be an adequate representative of the interests of the general public and would provide that the private plaintiff may not have a conflict of interest with the interests of the general public. The bill would also require the plaintiff's attorney to be an adequate representative of the interests of the general public. These matters would be determined by the court, and the representative cause of action would be stricken from the complaint if these requirements are not satisfied, as specified.

The bill would also require the private plaintiff to provide notice of the representative action to the Attorney General and to the district attorney of the county where the action is pending. The defendant would be required to notify the plaintiff and the court of any other related actions pending in this state against the defendant.

The bill would also require the plaintiff to notify specified persons prior to entry of judgment or modification of judgment with respect to a final determination of the

action, and would require a court hearing to determine if various requirements have been satisfied. A judgment approved by the court under these provisions would bar any further actions on representative causes of actions brought by private plaintiffs against the defendant based on substantially similar facts and theories of liability.

The bill would also provide that if a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, a court may stay the representative action, make an order for consolidation or coordination of the actions, or make any other order, in the interest of justice.

The bill includes other related provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

### THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 6 (commencing with Section 17300) is added to Part 2 of Division 7 of the Business and Professions Code, to read:

## CHAPTER 6. REPRESENTATIVE ACTIONS ON BEHALF OF THE PUBLIC

17300. As used in this chapter:

- (a) "Enforcement action" means an action by a prosecutor under Chapter 5 (commencing with Section 17200) or Part 3 (commencing with Section 17500).
- (b) "Prosecutor" means the Attorney General or appropriate district attorney, county counsel, city attorney, or city prosecutor.
- (c) "Representative cause of action" means a cause of action asserted by a private plaintiff on behalf of the general public under Section 17204 or 17535.
- (d) "Representative action" means any action in which a representative cause of action is pled,
- 17301. (a) A private plaintiff may plead a representative cause of action on behalf of the general public under Section 17204 or 17535 only if the requirements of this chapter are satisfied.
- (b) The private plaintiff shall separately state the representative cause of action in the pleadings, and shall designate it as being brought "on behalf of the general public" under Section 17204 or 17535, as applicable.

- (c) A representative cause of action may be brought as a class action pursuant to Section 382 of the Code of Civil Procedure.
- (d) No judgment or order which restores to any person in interest any money or property pursuant to Sections 17203 and 17535 shall be made by the court in a representative action unless such person is a party in such action and has appeared therein or unless the court shall have certified such action as a class action and such person is a member of such class.
- 17302. (a) A private plaintiff in a representative action must be an adequate representative of the interests of the general public pled and may not have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. The private plaintiff is not required to have sustained any injury by the defendant.
- (b) The attorney for a private plaintiff in a representative action must be an adequate legal representative of the interests of the general public pled.
- (c) On noticed motion of a party or on the court's own motion, the court shall determine by order whether the requirements of subdivisions (a) and (b) are satisfied. The determination may be based on the pleadings. The court may inquire into the matters in its discretion or may permit discovery. In making its determination, the court shall consider standards applied in class actions. If the court determines that the requirements of subdivisions (a) and (b) are not satisfied, the representative cause of action shall be stricken from the complaint.
- (d) An order under this subdivision may be conditional, and may be modified before judgment in the action.
- (e) This section does not preclude the court from granting appropriate preliminary relief before a determination is made under subdivision (c).
- 17303. Within 10 days after commencement of a representative action, the private plaintiff shall give notice of the action and on any application for preliminary relief, together with a copy of the complaint, to the Attorney General and to the district attorney of the county where the action is pending. Notice of any application for preliminary relief shall be given in the same manner as notice is given to the defendant.
- 17304. (a) Promptly after summons is served on the defendant in an enforcement action or representative action, the defendant shall notify the plaintiff and the court of any other enforcement actions, representative actions, or class actions pending in this state against the defendant that are based on substantially similar facts and theories of liability and that are known to the defendant.

- (b) Promptly after summons is served on the defendant in an enforcement action, representative action, or class action in this state, the defendant shall give notice of the filing to the plaintiff and the court in all pending enforcement actions and representative actions in this state against the defendant that are based on substantially similar facts and theories of liability and that are known to the defendant.
- 17305. (a) With respect to a representative cause of action, at least 45 days before entry of a judgment, or any modification of a judgment, which is a final determination of the representative cause of action, the private plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for a hearing on entry of the judgment or modification, to all of the following:
  - (1) The Attorney General.
  - (2) The district attorney of the county where the action is pending.
- (3) Other parties with cases pending against the defendant based on substantially similar facts and theories of liability known to the plaintiff.
- (4) Each person who has filed with the court a request for notice of the terms of judgment.
  - (5) Other persons as ordered by the court.
- (b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 17306. Nothing in this subdivision limits any other right a person may have to intervene in the action.
- (c) On motion of a party or on the court's own motion, the court for good cause may shorten or lengthen the time for giving notice under subdivision (a).
- 17306. (a) With respect to a representative cause of action, before entry of a judgment, or any modification of a judgment, which is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.
- (b) At the hearing the court shall consider the showing made by the parties and any other persons permitted to appear and shall order entry of judgment only if the court finds that all of the following requirements have been satisfied:
- (1) The proposed judgment and any stipulations and associated agreements are fair, reasonable, and adequate to protect the interests of the general public pled.

- (2) Any award of attorney's fees included in the judgment or in any stipulation or associated agreement complies with applicable law.
- (3) The private plaintiff satisfies the requirements of subdivision (a) of Section 17302.
- (4) The attorney for the private plaintiff satisfies the requirements of subdivision (b) of Section 17302.
  - (5) All other requirements of this chapter have been satisfied.
- 17307. A representative cause of action may not be dismissed, settled, or compromised without the approval of the court and a determination that the disposition of the representative cause of action is fair, reasonable, and adequate to protect the interests of the general public pled. The court, in its discretion, may set the matter for hearing on notice to persons who would receive notice under Section 17306 17305.
- 17308. The determination of a representative cause of action brought by a private plaintiff in a judgment approved by the court pursuant to Section 17306 is conclusive and bars the entry of any further setions judgments or orders on representative causes of action brought by private plaintiffs against the same defendant based on substantially similar facts and theories of liability.
- 17309. (a) If a private plaintiff has commenced an action that includes a representative cause of action and a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, the court in which either action is pending, on motion of a party or on the court's own motion, may stay the private plaintiff's representative cause of action, may make an order for consolidation of the actions, or may make any other order, in the interest of justice.
- (b) The determination under subdivision (a) may be made at any time during the proceedings and regardless of the order in which the actions were commenced.
- (c) Nothing in this section affects any right the plaintiff may have to costs and attorney's fees pursuant to Section 1021.5 of the Code of Civil Procedure or other applicable law.
- 17310. Notice provided to the Attorney General or a district attorney under Section 17303 or 17305 does not impose any duty on the Attorney General or district attorney. The Attorney General or district attorney is not precluded from taking any future action as a consequence of not taking action in response to notice or any determination made under Section 17306.
- 17311. (a) Except as provided in subdivision (b), this chapter does not apply to actions pending on its operative date. 23

(b) If the parties to a representative action commenced before the operative date of this chapter substantially comply with the provisions of this chapter, the substantive rules provided in this chapter apply in the action unless the court determines that application of a particular provision of this chapter would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons. For the purpose of this subdivision, Sections 17301 and 17302 are not applicable and the duty to give notice under Section 17303 is satisfied if the notice is given promptly after the operative date of this chapter.

# CONSUMER ATTORNEYS OF CALIFORNIA

David S. Casey, Jr. President

Alck Simons President-Elect

Donald C. Green Chief Legislative Advocate Nancy Drabble Senior Legislative Counsel Nancy Peverini Legislative Counsel Lea-Ann Tratten Legal Counsel

Law Revision Commission RECEIVED

APR 04 1997

File:\_\_\_\_\_

March 27, 1997

Senator Quentin Kopp State Capitol, Room 2057 Sacramento, CA 95814

RE: SB 143 (Kopp) OPPOSE UNLESS AMENDED

Dear Senator Kopp:

Consumer Attorneys of California has reviewed the proposed amendments to SB 143, which is scheduled to be heard before the Senate Judiciary Committee on April 8, 1997. We understand that the Commission is not agreeing to all of our suggested amendments and from its correspondence to us that it is unwilling to make some suggested changes on some specific amendments unless we remove our opposition to the entire bill, regardless of the failure to address other CAOC concerns. Therefore, we must remain opposed SB 143, unless it is amended. The major issue for CAOC is that the bill should apply to both public and private actions.

First, CAOC would like to reiterate that the Law Revision Commission, by sponsoring SB 143, has ignored the overwhelming testimony from all participants that there is not a current problem with this statute that demands a legislative response. Quite the contrary: except for a few alleged isolated cases, this statute has served Californians and small businesses exceedingly well in stopping unfair trade practices.

Second, while we appreciate the deletion of the res judicata provisions, we question the need to progress on the bill since most of the other provisions were originally related to that provision. We believe that the current bill, minus the res judicata provisions, only produces a confusing and likely very problematic scheme.

25

## Background

Over the course of the past two years, CAOC has participated in the Law Revision Commission's hearings on Business and Professions Code §Section 17200 and Unfair Competition Litigation. Based upon the Commission's drafts and revised drafts, the meetings we attended, our discussions with colleagues and others who attended these meetings, we are remain firmly convinced that the problems cited by the Commission regarding § 17200 are so isolated and insubstantial that they do not warrant a major change to the current statutory scheme. Throughout these hearings, only a handful of anecdotal reports of § 17200 "abuses" have been reported. They appear to be confined to a very small number of cases filed by less than a handful of lawyers throughout the state.

On the contrary, the enforcement of the statutory scheme embodied and referred to as § 17200 has become an important and effective means of enforcing numerous state statutes against unlawful, unfair and fraudulent business practices throughout California. A substantial body of case law has developed, including numerous reported decisions by the California Supreme Court and the Courts of Appeal which have interpreted § 17200 and which have provided effective equitable remedies in cases brought by private litigants and public interest organizations seeking to serve as a private attorney general to represent the interests of the public adversely affected by the practice at issue. Some provisions of SB 143 may address the perceived problems; however, we urge caution in enacting other provisions which have the unintended effect of making it more difficult for private litigants and public interest organizations to seek and obtain substantial redress for predicate acts of unfair competition.

Business and Professions Code § 17200 is an extraordinary remedy that dispenses with traditional procedural limitations on equity powers or class actions. Suits under Business and Professions Code § 17200 differ from those in traditional equity jurisdictions in that (1) an adequate remedy at law will not bar an injunction under Business and Professions Code § 17200, 6 Witkin, California Procedure (3d ed. 1985) Provisional Remedies, § 253, at 220; People v. Los Angeles Palm Inc. (1981) 121 Cal.App.3d 25, 32-33; (2) an injunction under § 17200 may be issued to enjoin criminal acts, 6 Witkin, California Procedure, supra, § 275, at 236; Business and Professions Code § 17202; and (3) the plaintiff does not have to show injury to herself from the challenged practice as standing to bring suit. Hernandez v. Atlantic Finance Co. (1980) 105 Cal.App.3d 65. As in class actions, the court in a suit under § 17200 may order "restitution in favor of absent persons." Dean Witter Reynolds, Inc. v. Superior Court (1989) 211

Cal.App.3d 758. But unlike class actions, the plaintiff in such a suit does not have to be an adequate representative of the group of individuals awarded restitution. City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 463 cf. Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 453-453.

Section 17200 provides only discretionary equitable remedies in exchange for both a lack of complete res judicata protection to a defendant and notice to individuals subject to the unlawful or fraudulent business practice. Unlike typical class actions, damages may not be awarded (Dean Winter Reynolds, Inc. v. Superior Court, supra, 211 Cal.App.3d 758; Bank of the West v. Superior Court (1992) 2 Cal.4th 1254) and because only equitable remedies are available, there is no right to a jury trial. Restitution is designed primarily to prevent the wrongdoer from retaining ill gotten gains. It may be awarded even if the challenged practice has ceased and no injunction is sought.

Those individuals who are aggrieved by the conduct of a particular business or governmental entity are particularly well suited to represent in an adequate way all others affected by the same practice. Because these litigants have a significant interest in obtaining injunctive relief to halt the business practice, as well as restitution to compensate them for the harm to themselves and others affected by the practice, they stand to gain only by obtaining substantial relief.

Indeed, many reported cases have involved injured individuals who brought actions and obtained relief both on their own behalf and on behalf of affected members of the general public. These include Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442; Barquis v. Merchants Collection Assn. of Oakland (1972) 7 Cal.3d 94; the underlying action referred to in Bank of the West v. Superior Court (1992) 2 Cal.4th 1254; and Hitz v. First Interstate Bank (1995) 38 Cal.App.4th 274.

## Some of SB 143's provisions help address the perceived problem.

CAOC believes that the proposed enactment of "adequate representative" and notice provisions, coupled with the ability to dismiss representative actions, adequately address the perceived problems without unfairly impacting consumers.

## A. Adequacy of Representation

CAOC remains concerned with Section 17302 (c) which says that the court may permit discovery into the adequacy and conflict of interest issues. In prior drafts, this provision specifically prohibited discovery, yet was changed without comment.

This provision is subject to abuse by a defendant who would attempt to harass either plaintiff or counsel with discovery. In addition, such requirements make § 17200 actions akin to class action requirements without providing for damages or jury trials.

### B. Notice Provisions

Although CAOC does not oppose § 17303's notice provision, we raise the question of what the consequences are for the failure to give the required notice. Clarification that a complaint would not be completely disqualified if the notice were not given in a timely fashion would be useful. Trial courts should retain discretion to determine that a failure to give notice did not adversely affect the interest of a governmental entity.

# C. Court Review of Dispositions--Public and Private

Requiring court review of dispositions of all representative lawsuits will ensure against any actual abuse by any individual litigant who would dismiss a legitimate representative cause of action by obtaining only individual recovery. (See § 17306.) Such review would also ensure against dismissal of or judgment upon representative claims brought by governmental entities for political or other reasons without obtaining any direct relief for those individuals actually harmed by the practice.

Under proposed §§ 17306-17308, the court can address the traditional standards which govern the resolution of class action settlements. Under these standards, it is unlikely that a court would approve a settlement in a representative action that provides no or only minimal benefits to the general public affected by the business practice while providing substantial benefits only to the named plaintiff.

However, we believe it is crucial that the §§ 17306-17308 apply to all actions brought under § 17200, including those brought by governmental agencies and actors. Public entities should be held to similar standards by supervising courts; the relief obtained in their lawsuits ought to benefit those on whose behalf the action was brought. We should not see situations in the future in which a government agency obtains some form of future prophylactic relief, statutory penalties paid to the agency and no relief for the individuals who have been harmed by the practice of the business entity which agrees to provide some benefit to totally unrelated parties. This would ensure against a situation like that addressed in the recent

litigation styled In re Computer Monitor Litigation, J.C.C.P. No. 3158 (San Francisco Superior Court), in which in preceding litigation, the Attorney General and several district attorneys had obtained a judgment which provided no relief to all affected members of the general public who had been harmed by the business practices challenged in the lawsuit.

Requiring uniform application would also ensure against a situation like <u>People v. Wilshire Computer College</u>, Los Angeles Superior Court Case No. BC)18391, a vocational school fraud case brought under § 17200 in which the Attorney General dismissed the action against the lender and state guaranty agencies in exchange for the lender's payment of the costs of the action without obtaining any relief from the lender for the students financially injured by the fraudulent scheme.

We appreciate the motion you made specifically to address this issue at the November, 1996, meeting of the Law Revision Commission. The amendment was passed unanimously by the Commission members; we believe it is extremely important to have that amendment in SB 143. If the goal of SB 143 is to obtain adequate relief to those who are represented and who were subject to unlawful, unfair or fraudulent business practices, then this standard should apply to all representative parties, private and public.

## D. Stay provisions

CAOC opposes the wording of § 17309 which places a legislative preference for trial courts to stay private representative actions. The section currently states that if a private plaintiff commences a representative action and a prosecutor has commenced a similar action, the court may stay the private action until the completion of the prosecutor's action. We see two major problems with this provision. First, the stay of the private action until the prosecutor's case is completed leads to enormous stale discovery problems, including the possibility of the loss or destruction of documents. Who knows how long the prosecutor's action will take--in the meantime, crucial evidence for the representative action may be lost, making that action useless and wasteful. Second, there is the possibility that the prosecutor may be subject to inappropriate political pressure to file and obtain inadequate relief or to dismiss corporate defendants without obtaining any relief for those directly affected by the unfair business practice. In the meantime, the private representative action becomes stale and the members of the general public subjected to the practice may be left with an inadequate remedy.

We recommend amendments that allow the court to, in the interest of justice, (1)

order consolidation or coordination of actions or (2) make any other necessary order. This approach allows a judge to order a stay where absolutely necessary to protect the interests of justice, without actually encouraging that avenue. Instead the trial court is required to act in the interests of justice to protect those whose interests are sought to be represented.

# E. Res Judicata--legislative intent

Although we appreciate the deletion of the res judicata provisions, we request a clear explanation for legislative history in order to avoid allowing defendants to argue that, because of the adequacy findings and court approval of settlements after notice and a hearing, section 17200 settlements will now have broader res judicata impact than currently exists.

In summary, CAOC respectfully requests the following amendments:

- 1. Apply SB 143's provisions to both public and private actions by amending Sections 17306-17308 to apply to all actions brought under Section 17200;
- 2. Amend § 17309 to delete the current language and instead to authorize the court, in the interests of justice, to (1) order consolidation or coordination of actions or (2) make any other necessary order;
- 3. Amend § 17303 to clarify that trial courts retain discretion to determine that the failure to give notice does not adversely affect the interests of any governmental entity.

Thank you for considering our requests. If you or a member of your legislative staff would like to discuss this further, please contact me or one of our representatives in Sacramento.

Sincerely,

David S. Casey

President

cc: Senate Judiciary Committee

) revia S Casy, Ir.



March 4, 1997

Law Revision Commission RECEIVED

The Honorable Quentin Kopp California State Senate P.O. Box 942848 Sacramento, CA 94248-0001

MAR 05 1997

File:			
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Re.

SB 143 (Kopp): SUPPORT IF AMENDED

Hearing: Tuesday, March 11, Senate Judiciary Committee

Dear Senator Burton:

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, is presently neutral on your SB 143 (Kopp). With one amendment, however, our position would change to support. We believe this change would further the intended purposes of the bill and be in the public interest.

This bill, sponsored by the California Law Revision Commission, would make substantial changes to one of our most important consumer protection statutes—the Unfair Competition Law (Bus. & Prof. Code § 17200, et. seq.). Consumers Union has brought several actions in its own name under Section 17200 to stop illegal business practices that harm consumers. The Commission began studying litigation brought under this statute, however, because of alleged abuses by some private plaintiffs and/or their counsel. During the two years of study, however, very few actual examples of problems were discovered. Even after the Commission widely distributed a notice calling on parties to come forward with examples of cases in which problems arose, virtually no examples were provided. Therefore, because of the lack of any empirical basis for changing the law, we question the need for this bill.

Nevertheless, despite the lack of documented problems, we believe many of the proposed changes represent desirable public policy. Examples of these provisions in the bill include Sections 17302-17307. However, the benefit from those provisions would be undermined by one section of the bill, Section 17308—and it is this section which we believe should be deleted.

Section 17308 would provide a statutory res judicata effect to a final judgment in a Section 17200 action which would bar any subsequent such action against the same defendant with similar facts and theories of liability. While finality of judgments is certainly a desirable goal, we believe that finality is available now, with existing legal tools, for judgments that deserve finality. Therefore, the Legislature need not take the

Market 18

The Honorable John Burton March 4, 1997 Page 2

defendant with similar facts and theories of liability. While finality of judgments is certainly a desirable goal, we believe that finality is available now, with existing legal tools, for judgments that deserve finality. Therefore, the Legislature need not take the extraordinary step of creating by statute a res judicata effect for this type of action. Equitable estoppel or mootness is already available to courts as a tool for dismissing subsequent truly repetitive actions.

Furthermore, creating res judicata by statutory flat may cause other, unintended negative consequences. As you stated yourself at the November 2, 1995 meeting of the Law Revision Commission, court review of proposed settlements and stipulated judgments of 17200 actions as proposed in Section 17306, creates the danger of cursory, rubber stamp approval. While we support such fairness hearings, we believe that the real possibility of rubber stamp approvals makes it critical that res judicata not apply to such judgments. Res judicata raises the possibility that "sweetheart" settlements between a colluding plaintiff and defendant, or other settlements that do not sufficiently benefit the general public may be approved by a busy judge reviewing a stipulated judgment in an uncontested hearing. Thus, a subsequent action alleging inadequate remedies to injured persons should not be barred automatically by res judicata, but should be allowed to proceed.

The real issue at stake when a subsequent representative action is filed is whether or not the interests of justice are served by allowing a subsequent action to proceed. This determination can only be made on a case-by-case basis, not with a blanket res judicata rule. In contrast to procedures under current law, the bill would prohibit a court in any second action from determining whether or not the second action is truly "duplicative" or not on a case-by-case basis. In other words, rather than decide finality in the abstract, we believe it is better for a court to determine finality upon the specific, concrete facts of a second action, if such an action is ever brought.

In our view, a court dealing with these issues must determine whether or not a subsequent representative action raises identical issues, practices, and alleged illegal conduct, and if so, whether allowing the second action to proceed would be inequitable to the defendant. A finding of inequity could be based on whether or not the prior action stopped the practice complained of and required full restitution to members of the public.

This "second look" afforded the court in a subsequent action serves several important purposes, under both current law or under the new procedures contemplated

The notice provision (\$17305), while an improvement over current law, will not guarantee sufficient input from interested parties. Public prosecutors and administrative agencies will be unlikely to use dwindling, scarce resources to contest many proposed settlements. Legal Services offices and other public interest organizations will probably not have the resources to monitor these cases either.

The Honorable John Burton March 4, 1997 Page 3

by the bill. First, it can correct inequities resulting from inadequate settlements that were rubber stamped by the court in the initial action. Even with court review and notice of the terms of a settlement, a stipulated judgment is still likely to be a nonadversarial proceeding. Courts simply do not engage in the same level of scrutiny in uncontested proceedings. Second, if res judicata is afforded the first judgment, the parties in the initial action have less incentive to "get the settlement right" precisely because of the potential low level of scrutiny by the court and the lack of a "second look" by a subsequent court. Unfortunately, some less scrupulous counsel may attempt to "sneak" bad settlements by the court and use the res judicata shield to prevent later attack on the settlement. Rather than placing the responsibility entirely on the first court of ensuring that the interests of justice are furthered by a proposed settlement, the possibility of a "second look" actually puts more of the responsibility on the parties.

For these reasons, the bill's "solution" of res judicata would, in fact, increase the likelihood of inadequate settlements. We believe this problem would far outweigh in significance and frequency the alleged problem of "copy-cat" litigation that res judicata attempts to address. As discussed above, no empirical showing has been made that there are "too many" repetitive actions being filed now. Thus, the drastic step of res judicata seems unnecessary.

### **Suggested Amendment**

For the reasons stated above, we suggest that Section 17308 be deleted from the bill because it is unnecessary and would create other potential problems.

Thank you for your consideration of our views.

Very truly yours,

Earl Lui Staff Attorney

cc: Senate Judiciary Committee

Indeed, such counsel have nothing to lose by attempting to do so. If "caught" by the Court, then the worst that would happen is they would craft a fairer settlement. However, under this new res judicata scheme, they would have a stronger negative incentive to make an attempt at benefiting themselves at the expense of the general public.



Law Revision Commission RECEIVED

MAR 1 8 1997

### FAX COVER SHEET

DATE:	March 18, 1997
TO:	Stan Ulrich, Law Revision Commission
FAX:	494-1827
FROM:	Earl Lui
RE:	SB 143

Number of pages including cover sheet:

- 1

### Message

Stan:

Upon reviewing the complete text of the bill again, I noticed a need for two technical amendments.

1. In Section 17301(a):

A private plaintiff may plead a representative cause of action on behalf of the interests of the general public . . , .

2. In Section 17301(b):

The private plaintiff shall separately state the representative cause of action in the pleadings, and shall designate it as being brought "on behalf of the interests of the general public" . . . .

Rationale: Adding the phrase "of the interests" would conform Section 17301 to the existing language in Section 17302(a) and (b) which use the phrase "interests of the general public." This is a small, but important point for organizational plaintiffs like Consumers Union. For plaintiffs like us, it would be more accurate to say we represent "the interests" of the general public because as lawyers for Consumers Union we would represent Consumers Union as an organizational plaintiff and not other parties in an action (though of course we would only bring an action to protect the interests of the general public). I don't think this change would affect the meaning of Section 17301.

I hope this is not a problem, I will call to follow up with you about this, or please call me first if you wish. Thank you for your consideration.

# THE DIAL CORPORATION

April 3, 1997

Law Revision Commission RECEIVED

Hon. Richard Kopp State Capitol Room 2057 Sacramento, CA 95815

APR 07 1997

Technical & Administrative Center

File:

15101 North Scottsdale Road Scottsdale, AZ 85254-2199

602 991 3000

ViA Telecopy

58 143 (Kopp) -- Oppose Unless Amended 58 1309 (Mountlov) -- Support If Amended

Dear Senator Kopp,

The Dlai Corporation is a consumer product manufacturer specializing in personal care, fabric care, air freshener, and shelf-stable food products. The Dial Corporation has six U.S. manufacturing locations; one is located in Los Angeles, California.

The Dial Corporation respectfully takes the following positions on legislation before the Senate Judiciary Committee: SB 143 — Oppose Unless Amended SB 1309 — Support If Amended.

In its current form, the so-called "California Unfair Competition Act" is in need of major reform because it is both unfair and anti-competitive.

It is unfair in that it gives private attorney general power to lawyers so they can sue businesses on their own without a client even if they have never suffered any harm or been exposed to the practice of which they complain. The lawyers stand to gain huge attorneys' fees and the prospect of a large recovery exacted from innocent companies that decide to settle rather than spend even more money to defend themselves against abusive lawsuits in court.

It is anti-competitive because is foists unnecessary costs on businesses like Dial who must engage in unproductive activities to protect themselves and defend against frivolous lawsuits. At least seven soap and detergent companies have been hit with meritless lawsuits under the Act in the last couple of months. This may eventually hurt the consumer in terms of higher prices.

Incredibly, this statute is the only one in the nation at the state or federal level that permits lawyers to file suits on behalf of the general public without any safeguards against

abuse. This lawyer loophole has created massive unfairness and continues to hurt the competitiveness of businesses operating in California.

58 143 does not solve the problem. While it would provide notice to the Attorney General that a private class action has been filed, it does nothing to prevent the filing of <u>frivolous</u> actions by lawyers in a representative capacity—the root problem of the Act. Instead, the Attorney General should act as a gatekeeper for representative actions with authority to deny frivolous claims and approve meritorious ones a the outset.

SB 143 also fails to provide other routine safeguards against abuse which ensure that a public action is truly representative and not just a tactic to increase the plaintiffs leverage by threatening innocent companies with inflated damage claims.

SB 1309, however, does include safeguards to ensure that the party bringing the suit adequately represents the interest of the general public. Still, SB 1309 stops short; all of the normal requirements for class action certification under Code of Civil Procedure 382 should apply here, including the existence of a common question.

SB 1309 would also appropriately bar additional lawsuits based on the same claims of injury to the same members of the general public over the same time period against the same defendants. SB 143, by contrast, is flawed in that it would not preclude identical claims and thus permits, and indeed encourages, an endiess cycle of lawsuits.

There are more than enough safeguards already in place to monitor business practices which preclude the need to deputize 122,000 lawyers with public prosecutor powers. The Attorney General, fifty-eight country country district attorneys, and multiple city prosecutors may bring representative actions, not to mention criminal prosecutions. Moreover, private parties may bring traditional business tort lawsuits if they are aggrieved.

But to the extent private parties can continue to bring lawsuits for the public at large, effective safeguards along the lines outlined above must be established to protect against such unfortunate abuse.

Respectfully,

Brenda E. Nuite, CSP

Regulatory Project Manager

### LIVINGSTON @ MATTESICH

Law Revision Commission RECEIVED

### MAR 07 1997

Gene	L	ΠNI	387(	Ņ
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March 7, 1997

Honorable John Burton, Chair Senate Judiciary Committee State Capitol, Room 4074 Sacramento, CA 95814

Re:

State Farm Insurance Companies' Opposition to SB 143 (Kopp),

Unless Amended

Senate Judiciary Committee Hearing: March 11, 1997

LIVINGSTON & MATTESICH LAW CORPORATION 1201 K STREET, SUITE 1100 SACRAMENTO, CA 95814 Дягваноме: (діб) <del>11</del>2.1111 Telecopies: (916) 448-1709

Dear Senator Burton:

State Farm regrets that it must oppose SB 143 (Kopp). It followed closely the work of the Law Revision Commission and hoped that legislation resulting from the Commission's work would address the major problems with the current Unfair Competition Act.

Today, anyone may bring an UCA action. The plaintiff need not have purchased a service or product, been misled by any statement, nor suffered injury in any way. In fact, recent court decisions allow an uninjured plaintiff to bring a 17200 action to enforce the alleged violation of a statute for which the plaintiff has no enforcement standing.

Today, the UCA allows class relief without any of the class action protections. Other substantial problems exist with the current form of the UCA, many of which were addressed in the Commission's initial research document.

Unfortunately, SB 143 does not adequately address these problems. It provides that the plaintiff must be "adequate" and have no conflicts. However, it sets no standard for what is adequate, saying only that the court may consider class action standards without mandating the court to follow those standards.

In addition, the disclosures and the invitation to others to intervene and participate render any settlement in an UCA cause of action nearly impossible, and it makes adjudicated resolution virtually impossible as well.

State Farm urges the author to postpone a hearing on this bill, to provide an opportunity to amend the bill to address effectively the current use excesses in the UCA.

Sincerely,

Senator Quentin Kopp CC:

Consultant, Senate Judiciary Committee

State Farm Insurance Companies

Personal Insurance Federation

Personal Insurance Federation of California

> Law Revision Commission RECEIVED

> > MAR 06 1997

File:

MEN	ΛÛ	RA	ND	IΠ	ИĪ

Date:

March 6, 1997

To:

Honorable John Burton, Chairman Members, Senate Judiciary Committee

From:

Dan C. Dunmoyer, President

Phyllis Marshall, Senior Legislative Counsel

Diane Colborn, Senior Legislative Advocate

RE:

SB 143 (Kopp): Unfair Competition Legislation: Representative

Actions

PIFC's Position: Oppose Unless Amended Senate Judiciary Committee: March 11, 1997

The Personal Insurance Federation of California (PIFC), representing insurers selling 44% of the personal lines insurance sold in California, opposes unless amended SB 143 by Senator Quentin Kopp. SB 143 makes certain changes to the Unfair Competition Act (hereinafter "UCA"). The Personal Insurance Federation and its member companies support the notion that reasonable standards must be established to pursue an action under the UCA. However, the changes proposed in SB 143 fail to address the fundamental problems implicit in the UCA and creates additional concerns in managing the effects of litigation.

The UCA, as currently interpreted and applied, allows an individual plaintiff who has not suffered injury from the alleged "unfair act" to pursue a representative action on "behalf of the general public" without demonstrating that the plaintiff is an adequate representative of the general public. The broad sweeping application of the statute has resulted in unjustified and unwarranted suits being brought against the business community. Additionally, and instead of serving the public interest, the statutes utility has been diminished to a tool which is used to generate an award of attorneys fee. Although SB 143 attempts to address some of the concerns raised by the UCA, it fails for the following reasons:

Section 17302(a) permits representative actions by plaintiffs who have not suffered any injury. Allowing an individual to pursue an action in the absence of injury is contrary to well established principals of civil law. And although the UCA provides that "any person acting for the interests of itself, its members of the general public" can bring suit for any unlawful or unfair business practice, the Legislature has never defined the standard to be applied for making this determination. Section 17302 would allow such actions to be pursued in the absence of injury on the part of the plaintiff representing the

(916).442-6646

interest of a class. At a minimum, a plaintiff should be required to show that he/she has suffered injury as a result of defendants action.

Indeed, providing that no injury be sustained on the part of the plaintiff is inconsistent with the requirement of Section 17302(a) that a plaintiff must be an adequate representative of the interest of the general public. On the issue of adequacy of plaintiff and plaintiff's attorney, Section 17302(c) makes a vague reference to class certification standards. This should be made specific to Code of Civil Procedure Section 382.

The requirement in Section 17304(b) to notify all other plaintiffs suing on the same theory, invites both coordinated discovery abuse and "whipsawing" settlement efforts where different plaintiff attorneys can intervene and hold up settlement. When attorneys were allowed to assert the Cumis right to counsel without any restrictions, abuses were widespread – this provision invites the same problem. Moreover, the existence of other actions are easily discoverable. Defendants can assert the existence of prior suits on the same grounds as a defense, and move to coordinate or consolidate the cases under present law. Unless the statute forces all representational plaintiffs to pursue a single action, this notice provision invites problems, not solutions. We suggest that unless plaintiffs are required to pursue a single action, the notice provision be stricken.

There are serious impediments to settlement under Section 17305, 17306, 17307 and 17308 as proposed by SB 143. Under Section 17308 settlements are not final adjudications unless there is a hearing under Section 17306. This perpetuates existing exposure to multiple suits on the same issue. The notice procedure in Section 17305 alerts all other plaintiffs counsel to the existence of a possible judgment. However, they can avoid the cost of actual intervention and wait until the judgment is about to be entered into before they make their objections. This is an invitation to coercion which will result in the tying of a case which is about to be resolved or settled, to other unresolved matters.

Another serious flaw is that Section 17306 makes settlement and even the court's own decision on the merits subject to a quasi-legislative hearing where all interested parties are allowed to criticize the result. This will substantially impair the ability of the court and the parties to finalize a judgment.

Several provisions also raise serious concern regarding the award of attorneys fees. The plaintiff's attorney fees are not subject to any reasonable restrictions such as class action standards, but instead to the vague requirement that they comply with "applicable law." In addition to this concern, Section 17307 does not apply any standards to attorney fees awarded as part of the settlement. Moreover, the reference to Code of Civil Procedure Section 1021.5 in Section 17309 (c) appears to allow plaintiffs counsel to avoid class action standards on fees. The findings by the court, at a minimum, should be subject to the class action standards of Code of Civil Procedure Section 382.

Finally, Section 17309 only gives the court discretion to stay an action if there is a pending enforcement action. This is contrary to the need to defer to the regulating body under primary jurisdiction grounds at least for matters relating to insurance as expressed in Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377 and Wolfe v. State Farm, et al. (1996) 46 Cal.App.4th 554.

For these reasons, PIFC opposes SB 143 by Senator Kopp, unless amended to address the concerns we have expressed. If you would like further information regarding our opposition to this measure, please feel free to contact Phyllis Marshall. Thank you for your consideration of this matter.

cc: Senator Quentin Kopp
Consultant, Senate Judiciary Committee
Senate Republican Caucus
Senate Floor Analysis
Gene Livingston, Livingston & Mattesich

Barbara Wheeler, ACTR

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THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY RILLS BAR ASSOCIATIONS

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IAN YOSS Seyforth, Show, Fairweather & Geraldion

Consumer Support Fund

BY FIRST CLASS MAIL AND FACSIMILE

April 2, 1997

Law Religion Commission RECENSD

APR 03 1997

The Honorable John Burton Chair, Senate Judiciary Committee State Capitol, Room 2205 Sacramento, CA 95814

File:

RE: SB 143 (Kopp) — Oppose Unless Amended Hearing: April 8, 1997

Dear Chairman Burton:

We are writing to express to you our concerns with SB 143 (Kopp), a bill to revise California's Unfair Competition Law. As discussed below, we continue to be opposed to the bill unless a number of provisions are amended—amendments which we believe are in the public's interest and in the interest of both unfair competition plaintiffs and defendants.

While we appreciate the willingness of the California Law Revision Commission ("CLRC"), the bill's sponsor, to consider amendments to the bill, we do not believe those amendments go far enough to address our concerns. Because we are not certain whether the author's office will in fact submit the CLRC amendments before the hearing, we have enclosed a copy of the CLRC's recent memo concerning its proposed amendments so that our comments will have some context. If the bill is not amended prior to the hearing, we refer the Committee to our earlier letters concerning the bill. We, of course, are willing to continue to work with the bill's sponsor and its author on the areas we believe require further amendment.

Our specific remaining concerns with SB 143, as proposed to be amended by the CLRC, are as follows:

### Proposed Section 17302(a)

By removing the language stating that a private plaintiff is not required to have sustained any injury, the legislative history of the proposed amended bill, may create an inference that in amending the bill, the Legislature sought to require a plaintiff to sustain injury in order to bring a representative

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Letter re SB 143 (Kopp) April 2, 1997 Page 2

action. We believe that the true "private attorney general" function of Section 17200 would be seriously undermined by this interpretation of private plaintiff standing. In order to clarify that a plaintiff is *not* required to have sustained injury, in accordance with California case law, we suggest that the following italicized language be inserted in proposed Section 17302(a):

(a) A private plaintiff in a representative action may not have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. A plaintiff asserting such an action may have, but is not required to have, sustained any injury by the defendant.

### Proposed Section 17303

We believe that because courts already possess an inherent power to sanction parties for failure to comply with procedural rules, the proposed amended language regarding sanctions in this Section is mere surplusage. As such, the following proposed amended language should be removed from Section 17303:

. . . but the court may impose appropriate sanctions or make any other order in the interest of justice.

### Proposed Section 17304

We continue to believe that sanctions should be included in this section for a defendant's failure to comply with applicable notice requirements. This is particularly the case if the Section 17303 sanction language proposed by the CLRC is adopted. There is no sound public policy basis for imposing sanctions on plaintiffs who fail to comply with notice requirements, but not to do so with respect to defendants who fail to comply.

### Proposed Sections 17305, 17306, 17307 and 17308

The CLRC proposed amendments to SB 143 no longer include Section 17308, the provision which would specifically accord res judicata effect to judgments and settlements in representative actions. Nonetheless, we believe that under existing law relating to res judicata, courts may find that the notice and hearing provisions contained in proposed Sections 17305-07 are sufficiently comprehensive so as to create a bar to future representative actions brought by private plaintiffs as well as to enforcement actions brought by public prosecutors. The likelihood that these provisions would have such an effect is extremely troubling. In order to protect against a prior resolution being viewed as a bar to any future representative or enforcement actions, we believe that the bill should be amended to specifically state that the determination of a representative cause of action is *not* res judicata as to any future representative or enforcement actions.

Our concern stems from our continued belief that the notice and hearing procedure in proposed Sections 17305-07 is defective. Pursuant to proposed section 17305, only public

Letter re SB 143 (Kopp) April 2, 1997 Page 3

prosecutors and parties presently suing the same defendant are likely to receive notice of the proposed judgment and upcoming hearing. Other members of the general public or entities that have knowledge about that defendant or issue, such as legal aid programs or non-profit organizations with particular expertise, including environmental or consumer organizations, will not receive notice unless they are aware of the action and have filed a request for notice under Section 17305(a)(4).

Even if all affected and interested parties were to receive notice of the Section 17306 hearing, the "protection" provided by this hearing is dubious. First, although certain parties may apply to intervene, the court is not required to allow their participation in the hearing. It is unrealistic to expect a trial judge to be receptive to re-opening the case for a further evidentiary hearing and of re-reviewing his or her own judgment for "fairness."

Similar issues are likely to influence the court's "approval" of settlements and dismissals of representative actions. It is doubtful that such courts will risk "exploding" a settlement reached by the parties by allowing significant intervention by non-parties to the litigation. As we noted in our earlier letters, in an action brought by the California Attorney General (People v. Wilshire Computer College, LASC No. BC018391) against a private vocational school and one of the banks which provided funding for the school's students, we sought to intervene on behalf of a group of students in order to challenge a proposed settlement which called for no restitution to be paid by certain settling defendants. Our effort to seek review of the fairness of the settlement was summarily rejected by the trial court.

The notice and hearing provisions proposed in SB 143 do not pose a significant threat to plaintiffs and attorneys who bring representative actions not truly designed to benefit the general public. We believe various measures, including demurrer, summary adjudication and sanctions provisions, already serve to curb frivolous claims. In addition, the court in a Section 17200 action possesses an extremely effective tool for discouraging lawsuits not truly in the public interest through limiting attorneys' fees under Code of Civil Procedure Section 1021.5 which requires that a party seeking fees show a significant benefit to the public.

The real potential for abuse comes with quick settlements and "sweetheart" deals, both of which will continue unhindered under the new provisions. As discussed above, in many cases those with information or interest will not receive notice or have an opportunity to present evidence to the court. As a result, in many instances, proposed judgments and settlements will go unchallenged — and the danger that a particular plaintiff could "sell-out" the interests of the general public will remain a problem. In addition, those bent on "abusing" Section 17200 could easily get around the "protections" of the notice and hearing requirements in SB 143 by settling the matter prior to filing a lawsuit. Therefore, despite SB 143's complicated provisions regarding notice and hearing, the perceived abuse of Section 17200 will remain unperturbed.

We also continue to believe that the judicial review process in Section 17305-17307 should apply equally to actions brought by private plaintiffs as well as actions brought by public prosecutors. We simply do not agree with those who have suggested that the public's ability to

Letter re SB 143 (Kopp) April 2, 1997 Page 4

vote the prosecutor out of office, if he or she settles an unfair competition case for inadequate restitution, is a realistic safeguard for the public.

If you have any questions or comments regarding our concerns, do not hesitate to give us a call. While we feel SB 143 contains beneficial provisions, we remain opposed to the bill unless it is amended.

Sincerely,

Kenneth W. Babcock
Directing Attorney
Consumer Law Project

Kathleen A. Michon Staff Attorney Consumer Law Project

Enc.

cc: Senator Quentin Kopp

Members of the Senate Judiciary Committee

Stan Ulrich, California Law Revision Commission

### OFFICE OF GOVERNMENTAL AFFAIRS

916 L STREET, SUITE 1260, SACRAMENTO, CALIFORNIA 95814

TELEPHONE: (916) 444-2762 FAX: (916) 448-0662

Law Revision Commission RECEIVED

April 7, 1997

APR 07 1997

The Honorable Quentin Kopp Member of the Senate, 8th District State Capitol, Room 2057 Sacramento, CA 95814

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# SB 143. as amended 4/2/97: TECHNICAL COMMENTS Legal Services Section

Dear Senator Kopp,

The Legal Services Section of the State Bar of California, composed of attorneys specializing in the delivery of legal services to the poor and middle income, consumers, juveniles, crime victims, the aged, persons with disabilities, and others who are traditionally underrepresented in the legal system, respectfully submits the attached comments on your SB 143 for your consideration. The Legal Services Section takes no official position on the measure, but hopes the comments made in its report will add to the dialogue surrounding the bill's consideration. If you would like more information, please contact the author of the attached report.

THIS POSITION IS ONLY THAT OF THE LEGAL SERVICES SECTION OF THE STATE BAR. IT HAS NOT BEEN APPROVED BY THE STATE BAR'S BOARD OF GOVERNORS OR OVERALL MEMBERSHIP, AND IS NOT TO BE CONSTRUED AS REPRESENTING THE POSITION OF THE STATE BAR OF CALIFORNIA. MEMBERSHIP IN THE LEGAL SERVICES SECTION OF THE STATE BAR IS VOLUNTARY. THE SECTION IS COMPOSED OF 673 MEMBERS FROM AMONG THE MORE THAN 120,000 ACTIVE MEMBERS OF THE STATE BAR OF CALIFORNIA.

It is the policy of the State Bar to refer legislative proposals affecting specific legal questions or the practice of law to the appropriate State Bar Committee or Section for review and comment. If you wish to discuss this position further, please feel free to contact the.

Best Regards,

4/1

Larry Doyle

Chief Legislative Counsel

Enclosure

cc: Senate Committee on Judiciary

Kevin E. Smith, Republican Committee Counsel Stan Ulrich, California Law Revision Commission Francisco Lobaco, Section Legislative Chair

Kathleen A. Michon, Member, Consumer Advocacy Committee

Joseph Bell, Section BCCL Liaison

Diane C. Yu, General Counsel, State Bar of California David Long, Director, State Bar Office of Research

Susan Mattox, Section Administrator

# THE LEGAL SERVICES SECTION THE STATE BAR OF CALIFORNIA

Chap Paul T. Persons Chair Sint Robert Boott Wyle Theory 14 Clement Raintres Arbit Kendette W. Bardock Petrock D. Lee



686 Franklin Otrezt San Francisco, California 64102-4496 (414) 541-5410 TO:

Larry Doyle, Chief Legislative Counsel

FROM:

Kathleen A. Michon

Consumer Advocacy Committee, Legal Services Section

DATE:

April 1, 1997

RE:

SB 143 (Kopp), as proposed to be amended on March 17, 1997

COMMITTEE POSITION:

**Technical Comments** 

Date position recommended:

April 1, 1997

#### ANALYSIS:

#### (1) SUMMARY OF EXISTING LAW

Sections 17200 et seq. and 17500 et seq. of the California Business and Professions Code ("Section 17200" and "Section 17500") prohibit unlawful, unfair or fraudulent business acts or practices and untrue or misleading advertising. Under existing law, relief for violations of these provisions may be obtained by both public prosecutors and by private parties acting on behalf of themselves and/or on behalf of the general public. Available remedies include civil penalties (through public prosecutor actions only), restitution and injunctive relief.

#### (2) CHANGES TO EXISTING LAW PROPOSED BY THIS BILL

The following comments are based on amendments that the California Law Revision Commission (the bill's sponsor) proposed on March 17, 1997. A copy of CLRC's memo which includes those amendments is attached. Our comments are on the bill as proposed to be amended to ensure that our comments are considered in connection with the text of the bill which will likely be heard at the bill's scheduled hearing on April 8, 1997 before the Senate Judiciary Committee.

SB 143 would define representative causes of action as those brought on behalf of the general public and would require a plaintiff in such actions to comply with procedural requirements imposed by a new chapter in the Business and Professions Code. The Committee believes that this new chapter ("chapter 6") also would affect the substance of Sections 17200 et seq. and 17500 et seq.

SB 143 would inject class action-like procedural requirements into representative causes of action seeking to enforce Section 17200. For example, the private plaintiff in a representative cause of action could not have a conflict with the interests of the general public asserted, and the plaintiff's counsel would be required to be an adequate legal representative of the interests of the general public asserted.

SB 143 would require a court hearing prior to entry of judgment in a representative action to determine the adequacy of the judgment in protecting the interests of the general public. Plaintiffs would be required to provide notice of the hearing and the terms of the proposed judgment to specified parties. In addition, SB 143 would require court approval of any dismissal or settlement of a representative action, and would allow the court, in its discretion, to hold a noticed hearing to determine the adequacy of the resolution in protecting the interests of the general public. Finally, SB 143 allows a court, in its discretion, to stay, consolidate or coordinate pending private representative actions and actions brought by public prosecutors against the same defendant and based on similar facts.

# (3) ANALYSIS OF PROPOSED CHANGES AND RECOMMENDED AMENDMENTS.

### (a) Background

SB 143 stems from the California Law Revision Commission's ("CLRC") 1995-96 study of unfair competition litigation. The CLRC process has attracted significant discussion and examination in which various members of the Consumer Advocacy Committee and the Legal Services Section have been involved. The Section and Committee submitted written comments to the CLRC's study in August, 1996. Recently, in apparent response to substantial opposition to certain provisions contained in the original version of the bill. Senator Kopp's office introduced this amended version.

#### (b) General Analysis

The Committee believes that the enactment of SB 143, as presently drafted, poses significant due process problems and may interfere with the work of public prosecutors. In addition to these concerns, which are discussed at length below, the Committee is skeptical as to the purpose that SB 143 serves. Although the CLRC cites widespread abuse of Section 17200 actions as the reason for introducing the bill, to date, these problems have not been

documented. In any event, the bill as it stands does not appear to be capable of significantly reducing the incidence of the abuses alleged, as detailed below.

### (c) Analysis of Specific Sections

### Exclusion of Certain City Attorneys in Proposed Sections 17303, 17305 and 17310

Business and Professions Code Section 17204 specifically empowers a city attorney in a city, or city and county, having a population in excess of 750,000, to bring an enforcement action pursuant to Section 17200 without prior authorization of a district attorney. Although proposed Sections 17303 and 17305 require notice to the Attorney General and district attorney of the county where the action is pending, those sections do not require notice to the city attorneys described above. Nor does proposed Section 17310, which addresses the effect of private plaintiff representative actions on public prosecutor enforcement actions, include these particular city attorneys.

The Committee believes that, as city attorneys in a city, or city and county, having a population in excess of 750,000 are specifically authorized to bring Section 17200 enforcement actions, they should be included in all notice provisions and in proposed Section 17310, along with the Attorney General and district attorney.

#### Proposed Section 17302(a)

By removing the language stating that a private plaintiff is not required to have sustained any injury, the bill, as amended, creates an inference that in amending the bill, the Legislature is requiring a plaintiff to sustain injury in order to bring a representative action. The Committee believes that the true "private attorney general" function of Section 17200 would be seriously undermined by such an interpretation of private plaintiff standing. In order to clarify that a plaintiff is not required to have sustained injury, in accordance with California case law, the Committee suggests that the following language be inserted in proposed Section 17300(c):

(c) "Representative cause of action" means a cause of action asserted by a private plaintiff on behalf of the general public under Section 17204 or 17535. A plaintiff asserting such an action may have, but is not required to have, sustained injury by the defendant.

<sup>&</sup>lt;sup>1</sup>The Committee notes that certain county counsel or other city attorneys may bring Section 17200 enforcement actions only if authorized by the appropriate district attorney.

#### Proposed Section 17302(b)

By failing to articulate a standard to determine whether an attorney is an "adequate representative" of the interests of the general public, this provision will do little to curb the incidence of abusive lawsuits. An experienced and well-financed attorney could easily satisfy the undefined standard in this section, making it appear that he or she is an adequate representative, when in fact that attorney is bringing an abusive or frivolous claim. By the same token, there is no reason to believe that a legal aid or public interest attorney, who the court may find to be an inadequate representative, would in fact be an inappropriate representative of the general public's interest. Indeed, to the extent that any abuses in the area of unfair competition litigation have occurred, it is through the filing of frivolous lawsuits — not because of the inexperience or lack of financial resources of counsel.

We believe that by providing a well-defined standard, this provision would be more effective. For example, specifying that an attorney is an "adequate representative" if he or she is qualified to conduct the proposed litigation, may be more appropriate. See McGhee v. Bank of America (1976) 60 Cal. App. 3d 442; 131 Cal. Rptr. 482.

#### Proposed Section 17303

This provision is unclear as to how notice should be provided in situations involving other than an application for preliminary relief. For purposes of clarity, the Committee believes that this section should specify the type of notice required, whether it be by mail, facsimile or personal service.

In addition, the Committee believes that because courts already possess an inherent power to sanction parties for failure to comply with procedural rules, the language regarding sanctions in this provision is mere surplusage. As such, the Committee suggests that this provision be amended to remove that language, as follows:

Failure to give notice within the time provided is not grounds for dismissal of the representative action, but the court may impose appropriate sanctions or make any other order in the interest of justice.

#### Proposed Section 17304

If the sanctions proposed in Section 17303 for a plaintiff's failure to comply with applicable notice requirements are adopted, the Committee believes that similar sanction provisions should be included in this section for a defendant's failure to comply with applicable notice requirements. There is no sound public policy basis for imposing sanctions on plaintiffs who fail to adhere to the bill's proposed notice requirements, but not to do so with respect to defendants who fail to comply.

### Proposed Sections 17305, 17306 and 17307

Although SB 143 no longer includes a provision which specifically accords res judicata effect to judgments and settlements in representative actions, the Committee believes that under existing law relating to res judicata, the notice and hearing provisions contained in these sections may be found to create a bar to future representative actions brought by private plaintiffs and enforcement actions brought by public prosecutors. The danger that these provisions, if enacted into law, would have such an effect is extremely troubling to the Committee, as detailed below.

### (a) Potential Bar to Future Private Actions

Proposed Sections 17305 and 17306 would impose notice and hearing requirements prior to entry of judgment. For example, prior to entry of judgment, plaintiffs in a representative action would be required to provide notice of the terms of the judgment and the hearing to public prosecutors, other parties with pending representative actions against the same defendant and other individuals who have previously requested notice. At the noticed hearing, the court would be required to determine that the judgment, stipulations and agreements are fair and adequate to protect the interests of the general public.

Proposed Section 17307 governs settlements and dismissals. That provision would require court approval of all dismissals and settlements in order to determine that the interests of the general public are protected. In its discretion, the court may set the matter for hearing upon notice to those parties who would receive notice in Sections 17305 and 17306.

In reality, these provisions do little to provide the public with any meaningful opportunity to be heard. For example, pursuant to proposed Section 17305, only public prosecutors and parties presently suing the same defendant are likely to receive notice of the proposed judgment and upcoming hearing. Other members of the general public or entities that have knowledge about that defendant or issue, such as legal aid programs or non-profit organizations with particular expertise (including environmental organizations, consumer advocacy agencies, etc.), will receive no notice unless they are aware of the action and have filed a request for notice under Section 17305(a)(4). Thus, those who may be in the best position to assess the "fairness" of a proposed judgment or settlement may be cut out of the process.

Thus, the Committee concludes that the proposed hearing prior to dismissal or entry of judgment after settlement does not reach its goal of providing notice and the opportunity to be heard to all affected members of the general public. Because a court could conclude that proposed Sections 17305 and 17306 provide a comprehensive notice system (which they in fact do not), a representative action could be afforded the very res judicata effect which the CLRC's proposed amendment seeks to eliminate by deleting proposed Section 17308. To

protect against a court arriving at such a conclusion, rather than eliminate proposed Section 17308, it should be amended to make clear that the determination is not conclusive and does not bar any further action, be it representative or public.

If determinations of these actions were accorded conclusive effect in every instance, which the Committee believes would be the effect of the notice and hearing provisions, the result would be manifestly unfair and would bar many legitimate, necessary representative actions. Margayer, these runvisions actually do little to discourage the shuser which the CLPC note that it is seeking to address.

In addition, relying upon public prosecutors to protect the public interest in every instance is unrealistic. Due to resource limitations, prosecutors will be unable to intervene in every representative action in order to ensure that the interests of the general public are vindicated. Therefore, as a practical matter, it is likely that in many of the hearings anticipated by Section 17306, no one will apply to intervene in order to prevent "sweetheart" deals and to protect the interests of the general public.

Even if all affected and interested parties were to receive notice of the Section 17306 hearing, the "protection" provided by this hearing is dubious. First, although certain parties may apply to intervene, the court is not required to allow their participation in the hearing. It is impractical and unrealistic to expect a trial judge to be receptive to the prospect of reopening the case for further evidentiary hearing and of re-reviewing his or her own judgment for "fairness." Even if the judge did reopen the case, the presentation and receipt of new evidence proffered by the intervening party could seriously affect the due process rights of the party against whom the evidence is offered. Judges in such a situation are likely to severely limit such intervention or provide only "lip service" to those allowed to intervene at the eleventh hour.

Similar issues are likely to influence the court's "approval" of settlements and dismissals of representative actions. Trial courts with overly burdened dockets are increasingly pushing parties to settle lawsuits. It is doubtful that such courts will risk "exploding" a settlement reached by the parties by allowing significant intervention by non-parties to the litigation. Indeed, as the notice and hearing requirements in SB 143 apparently are discretionary with respect to dismissals and settlements, many courts may opt to forego these "protections" sitogether. In any event, those affected individuals and entities that do receive notice and

That notice and a hearing are required after trial and prior to entry of judgment, but discretionary when an action is dismissed or settled is odd. It would appear to the Committee that the potential for "unfair" or "inadequate" resolutions to representative actions would be more likely when an action is settled, rather than when a judgment is entered by a court after trial.

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are allowed to intervene, will, in most cases, not have enough time to learn the facts and evidence relevant to the case in order to evaluate the adequacy of the settlement and present any cogent objections to the court.

Although these provisions are apparently designed to expose quick settlements and "sweetheart" deals, these abuses can be expected to continue unhindered under the new provisions. As discussed above, those with information or interest will most likely not receive notice nor have an opportunity to present evidence to the court. As a result, in most instances, proposed judgments and settlements will go unchallenged — and the danger that a particular plaintiff could "self-out" the interests of the general public will remain a problem. If, as the Committee fears, such judgments and settlements are accorded res judicata effect, defendants may be afforded protection from any future lawsuit designed to truly vindicate the interests of the general public. This result would be devastating to the interests of the general public, and to public interest groups, legal aid organizations, consumer advocates and other legitimate plaintiffs and their counsel, who would be barred from seeking to halt unfair and illegal business practices simply because a plaintiff willing to enter into a cheap settlement "beat them" to a case.

### (b) Potential Bar to Future Enforcement Actions By Public Agencies

The proposed amendments to SB 143 are ambiguous as to the res judicata effect of private representative actions on subsequent enforcement actions by public prosecutors against the same defendant. Although proposed Section 17310 appears to exempt public prosecutors from any conclusive effect of prior private actions in some instances, it may not do so in all instances. For example, although that section states that public prosecutors are not precluded from taking future action "as a consequence of not taking action" in response to a noticed hearing, it is silent as to the conclusive effect of a judgment or settlement in a private representative action if a public prosecutor does take action in the private lawsuit. Consider a public prosecutor who appears at a hearing prior to entry of judgment in a private representative action and who unsuccessfully objects to the proposed settlement. Under a fair reading of the bill and the law on res judicata, that prosecutor may later be precluded from bringing an action against the defendant to truly vindicate the rights of the general public. This potential result may serve to discourage public prosecutors from becoming

There are numerous reasons why a public prosecutor entering into the process at the eleventh hour may not be successful in persuading the court that the proposed settlement does not adequately protect the interests of the general public. For example, as discussed above, the prosecutor may not have enough time to learn the facts and evidence relevant to the case in order to effectively evaluate the adequacy of the settlement or judgment, the court may not allow the prosecutor to present evidence at the hearing and/or the court may be unwilling to "explode" a settlement by reopening a case for further evidentiary hearing and review.

involved in noticed hearings in private representative actions, in effect frustrating one of the bill's purposes.

In addition, the danger that settlements and judgments in private representative actions will be found to bar later enforcement actions against the same defendant brought by public prosecutors is increased due to the requirements contained in proposed Sections 17303 and 17305, which specifically provide notice to public prosecutors. As such, public prosecutors are more likely to be barred from bringing future actions than private litigations who may not have received notice.

Such a result would negatively impact public prosecutor offices state-wide. In order to avoid later preclusion from bringing an action on behalf of the general public against a particular defendant or scam, public prosecutors may be pressured to become involved in every pending Section 17200 representative action, either to bring its own action, to prepare for noticed hearings, or to make a determination that involvement is unnecessary. By expending significant resources on responding to suits brought by private individuals, public prosecutors will be able to focus less time on their own priorities and proactive strategies. Such a result would subvert the over-arching purpose of Section 17200 representative actions — that is, that they should supplement, not dictate, law enforcement efforts. Public prosecutors were never intended to, and should not, be bound by private representative actions.

The Committee believes that SB 143 presents potentially adverse consequences to the due process rights of members of the general public and possible negative impacts on public prosecutors. Many of these concerns would be reduced anti/or eliminated if SB 143 were amended to specifically state that determinations of representative actions shall not be accorded res judicata effect.

Given the Committee's skepticism as to the ability of SB 143 to address the perceived "abuses" of Section 17200, coupled with the significant problems with various provisions outlined above, the Committee is convinced that this legislation is both ill-advised and not necessary. In fact, various measures already exist to curb frivolous claims, including demurrer, summary adjudication and sanctions provisions. In addition, we believe that the most effective tool at a court's disposal to halt abusive lawsuits is to deny attorneys' fees sought by private litigants pursuant to Code of Civil Procedure Section 1021.5, which requires that a party seeking fees show a significant benefit to the public. Such measures, if regularly employed, would do far more to prevent abusive Section 17200 actions than the provisions proposed by the CLRC in SB 143.

Furthermore, the Committee is not convinced of the necessity of injecting class action-like procedures into Section 17200 actions. In order to allow "private attorney generals" to supplement law enforcement efforts. Section 17200 is designed to provide limited remedies (injunctive relief and restitution only) to litigants seeking to move quickly to curb ongoing

uniawful and unfair business practices. It is not designed to provide damages to large numbers of individuals, and therefore dispenses with time-consuming procedural requirements. For those litigants who do wish to obtain damages for a large number of individuals, other litigation measures exist, such as class action provisions.

### (4) GERMANENESS

This bill clearly relates to the quality of legal services because the Committee believes that its effect will be to deprive affected members of the general public redress for unlawful and unfair business practices and misleading advertising through representative actions under Business and Professions Code Sections 17200 et seq. and 17500 et seq.

The members of the Committee are public interest and legal services attorneys representing private parties, and public prosecutors, who regularly utilize and provide training regarding Section 17200 claims and representative actions. As such, the Committee possesses the special knowledge, training and experience to provide the Legislature with important analysis and technical comments necessary to assessing the merits of this bill.

### **Introduced by Senator Mountjoy**

February 28, 1997

An act to amend Sections 17204 and 17535 of the Business and Professions Code, relating to unfair competition.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 1309, as introduced, Mountjoy. Unfair competition.

Existing law prohibits unfair competition and certain unlawful, unfair, or fraudulent business acts or practices, and authorizes actions for relief to be brought by the Attorney General, a district attorney, a county counsel, a city attorney, or on the complaint of any board, officer, person, corporation, or association, or by any person acting for the interests of itself, its members, or on behalf of the general public. These provisions provide for various remedies, including injunctive relief, restitution, and civil penalties.

This bill would:

- (1) Require a person bringing an action under these provisions solely on his or her own behalf to have been harmed or threatened with some harm by the unlawful acts or practices.
- (2) Require a person acting for the interests of its members to prove that some or all of the members were harmed or threatened with some harm, and if restitution is sought, require the person to comply with certain provisions governing class actions.
- (3) Require a private person who brings an action under these provisions on behalf of the general public to have been harmed or threatened with some harm, be an adequate

representative of the interests of the general public, have an attorney who will adequately represent the interests of the general public, and have claims or defenses typical of the claims or defenses of the general public, as determined by the court.

(4) Require court approval following a hearing in order for an action brought under (3) to be dismissed or compromised, as specified, and provide that a judgment approved by the court in that regard is conclusive and would bar any further similar representative actions against the same defendant based on substantially similar facts and theories of liability.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 17204 of the Business and 2 Professions Code is amended to read:

2 Professions Code is amended to read: 3 17204. (a) Actions for any relief pursuant to this 4 chapter shall be prosecuted exclusively in a court of 5 competent jurisdiction by the Attorney General or any 6 district attorney or by any county counsel authorized by 7 agreement with the district attorney in actions involving 8 violation of a county ordinance, or any city attorney of a 9 city, or city and county, having a population in excess of 10 750,000, and, with the consent of the district attorney, by 11 a city prosecutor in any city having a full-time city 12 prosecutor or, with the consent of the district attorney, by 13 a city attorney in any city and county in the name of the 14 people of the State of California upon their own 15 complaint or upon the complaint of any board, officer, 16 person, corporation or association or by any person acting 17 for the interests of itself, its members, or the general 18 public.

19 (b) Any person bringing an action for relief pursuant 20 to this chapter solely on his or her own behalf shall have

21 been harmed or threatened with some harm by the acts

22 or practices prohibited by this chapter in order to

23 maintain the action.

- 1 (c) Any person acting for the interests of its members 2 who brings an action for relief pursuant to this chapter 3 shall prove that some or all of its members have been 4 harmed or threatened with some harm by the acts or 5 practices prohibited by this chapter, and if restitution for 6 its members is sought, shall satisfy the requirements of 7 Section 382 of the Code of Civil Procedure.
- 8 (d) Any private person who brings an action for any 9 relief pursuant to this chapter on behalf of the general 10 public shall have been harmed or threatened with some 11 harm by the acts or practices prohibited by this chapter, 12 shall be an adequate representative of the interests of the 13 general public, shall have retained an attorney who will 14 adequately represent the interest of the general public, 15 and shall have claims or defenses typical of the claims or 16 defenses of the general public. As soon as practical after 17 the commencement of an action on behalf of the general 18 public, the court shall determine by order whether the 19 action may be maintained.
- 20 (e) Any action authorized by the court to be brought by a private person acting on behalf of the general public may not be dismissed or compromised without the approval of the court, following a hearing in which the court finds that the proposed judgment or dismissal of the action is fair, reasonable, and adequate to protect the interests of the general public. Notice of the proposed demand or compromise shall be given as the court directs. The determination of an action brought by a person acting on behalf of the general public pursuant to a judgment approved by the court is conclusive and bars any further actions brought by private persons on behalf of the general public against the same defendant based on substantially similar facts and theories of liability.
- 34 (f) Nothing in this section shall preclude a person from 35 bringing a class action for relief pursuant to this chapter 36 if the requirements of Section 382 of the Code of Civil 37 Procedure are satisfied.
- 38 SEC. 2. Section 17535 of the Business and Professions 39 Code is amended to read:

- 17535. (a) Any 1 person, corporation, partnership, joint stock company, or any other association or organization which that violates or proposes to violate 4 this chapter may be enjoined by any court of competent 5 iurisdiction. The court may make such orders 6 judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by 8 any person, corporation, firm, partnership, joint stock 9 company, or any other association or organization of any 10 practices which that violate this chapter, or which that 11 may be necessary to restore to any person in interest any 12 money or property, real or personal, which may have 13 been acquired by means of any practice in this chapter 14 declared to be unlawful.
- 15 (b) Actions for injunction under this section may be 16 prosecuted by the Attorney General or any district 17 attorney, county counsel, city attorney, or city prosecutor 18 in this state in the name of the people of the State of 19 California upon their own complaint or upon the 20 complaint of any board, officer, person, corporation or 21 association or by any person acting for the interests of 22 itself, its members, or the general public.
- 23 (c) Any person bringing an action for relief pursuant 24 to this chapter solely on his or her own behalf shall have 25 been harmed or threatened with some harm by the acts 26 or practices prohibited by this chapter in order to 27 maintain the action.
- 28 (d) Any person acting for the interests of its members 29 who brings an action for relief pursuant to this chapter 30 shall prove that some or all of its members have been 31 harmed or threatened with some harm by the acts or 32 practices prohibited by this chapter, and if restitution for 33 its members is sought, shall satisfy the requirements of 34 Section 382 of the Code of Civil Procedure.
- 35 (e) Any private person who brings an action for any 36 relief pursuant to this chapter on behalf of the general 37 public shall have been harmed or threatened with some 38 harm by the acts or practices prohibited by this chapter, 39 shall be an adequate representative of the interests of the 40 general public, shall have retained an attorney who will

1 adequately represent the interest of the general public, 2 and shall have claims or defenses typical of the claims or 3 defenses of the general public. As soon as practical after 4 the commencement of an action on behalf of the general 5 public, the court shall determine by order whether the 6 action may be maintained.

f) Any action authorized by the court to be brought by a private person acting on behalf of the general public may not be dismissed or compromised without the approval of the court, following a hearing in which the court finds that the proposed judgment or dismissal of the action is fair, reasonable, and adequate to protect the interests of the general public. Notice of the proposed demand or compromise shall be given as the court directs. The determination of an action brought by a person acting on behalf of the general public pursuant to a judgment approved by the court is conclusive and bars any further actions brought by private persons on behalf of the general public against the same defendant based on substantially similar facts and theories of liability.

21 (g) Nothing in this section shall preclude a person 22 from bringing a class action for relief pursuant to this 23 chapter if the requirements of Section 382 of the Code of 24 Civil Procedure are satisfied.

#### AMENDED IN ASSEMBLY APRIL 1, 1997

CALIFORNIA LEGISLATURE-1997-98 REGULAR SESSION

### ASSEMBLY BILL

No. 1295

### Introduced by Assembly Member Caldera

February 28, 1997

An act to amend Sections 17200 and 17500 of 17204 and 17535 of, and to add Chapter 6 (commencing with Section 17300) to Part 2 of Division 7 of, the Business and Professions Code, relating to unfair practices.

#### LEGISLATIVE COUNSEL'S DIGEST

AB 1295, as amended, Caldera. Unfair practices.

Existing law prohibits unfair competition and certain unlawful, unfair, or fraudulent business acts or practices, and authorizes actions for relief to be brought by the Attorney General, a district attorney, a county counsel, a city attorney, or on the complaint of any board, officer, person, corporation, or association, or by any person acting for the interests of itself, its members, or on behalf of the general public. These provisions provide for various remedies, including injunctive relief, restitution, and civil penalties, as specified.

This bill would enact additional requirements to be met by a person bringing an action under these provisions if the person is seeking restitution or other monetary relief available under these provisions and if the person is not the Attorney General, a district attorney, a city attorney, or any other official of a governmental entity. The bill in these cases would require a private person to have suffered actual injury as a

result of a violation, and with respect to an injury arising from a misrepresentation, the bill would require the person to show that he or she was actually misled, that he or she actually and reasonably relied on the representation, and that the person responsible for the representation knew or should have known that the misrepresentation was deceptive, untrue, or misleading.

The bill would allow a person to bring an action in these cases on behalf of persons similarly situated, but would require the action to comply with certain provisions governing class actions, and would provide that a judgment for monetary relief shall serve as a final judgment of the class.

Under the Unfair Practices Act, unfair competition is defined to include an unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue; or misleading advertising, and any false representations to the public.

Existing law provides that it is unlawful for any person, firm, corporation, or association to make untrue or misleading statements in connection with the sale of real or personal property or the performance of services, as specified. Violation of this prohibition is misdemeanor.

This bill would make technical, nonsubstantive changes to these provisions.

Vote: majority. Appropriation: no. Fiscal committee; no. State-mandated local program: no.

The people of the State of California do enact as follows:

#### 1 SECTION 1. Section 17200 of the Business and

- 2 SECTION 1. Section 17204 of the Business
- Professions Code is amended to read:
- 4 17204. Actions for any relief pursuant to this chapter 5 shall be prosecuted exclusively in a court of competent
- jurisdiction by the Attorney General or any district
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- attorney or by any county counsel authorized agreement with the district attorney in actions involving 8
- 9 violation of a county ordinance, or any city attorney of a
- 10 city, or city and county, having a population in excess of
- 11 750,000, and, with the consent of the district attorney, by
- 12 a city prosecutor in any city having a full-time city

1 prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own 4 complaint or upon the complaint of any board, officer, 5 person, corporation or association or by any person acting 6 for the interests of itself, its members or the general public. An action brought under this chapter seeking 7 restitution or other monetary recovery available under 9 this chapter, other than an action brought by the 10 Attorney General, a district attorney, a city attorney, or any other official of a governmental entity, shall be subject to Chapter 6 (commencing with Section 17300).

SEC. 2. Chapter 6 (commencing with Section 17300) 14 is added to Part 2 of Division 7 of the Business and 15 Professions Code, to read:

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### CHAPTER 6. PRIVATE ACTIONS SEEKING RESTITUTION OR OTHER MONETARY RECOVERY

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17300. (a) A private person bringing an action for a violation of Chapter 5 (commencing with Section 17200) or Part 3 (commencing with Section 17500), who is 23 seeking restitution or other monetary recovery available under those chapters, may bring an action with respect 25 to that violation only as provided by this chapter.

- 26 (b) Nothing in this chapter applies, or shall be 27 construed to apply, to any action brought by the Attorney 28 General, a district attorney, a city attorney, or any other 29 official of a governmental entity pursuant to Chapter 5 17200) Part 30 (commencing with Section or31 (commencing with Section 17500).
- 32 17301. A person subject to this chapter bringing an 33 action on his or her own behalf may bring an action only 34 if the following requirements are met, as applicable:
- 35 (a) The person suffered actual injury as a result of the 36 violation. As used in this section, "actual injury" means a 37 monetary loss or personal injury.
- 38 (b) For an injury arising from a misrepresentation, in 39 addition to meeting the requirement of subdivision (a), 40 the person shall be required to show all of the following:

- 1 (1) The person was actually misled by the 2 representation.
- 3 (2) The person actually and reasonably relied on the 4 representation.
- 5 (3) The person responsible for the misrepresentation 6 knew or should have known that the misrepresentation 7 was deceptive, untrue, or misleading.
- 8 17302. (a) A person subject to this chapter may bring 9 an action seeking restitution or other monetary recovery 10 for a violation of Chapter 5 (commencing with Section 11 17200) or Part 3 (commencing with Section 17500) on 12 behalf of other persons similarly situated. However, those 13 actions are subject to the requirements applicable to 14 representative actions under Section 382 of the Code of 15 Civil Procedure.
- 16 (b) A judgment that meets the requirements of 17 Section 382 of the Code of Civil Procedure for monetary 18 relief shall serve as a final judgment of the class under that 19 section.
- 20 SEC. 3. Section 17535 of the Business and Professions 21 Code is amended to read:
- 22 17535. Any person, corporation, firm, partnership, 23 joint stock company, or any other association organization which that violates or proposes to violate this chapter may be enjoined by any court of competent The iurisdiction. court may make such orders 26 judgments, including the appointment of a receiver, as 28 may be necessary to prevent the use or employment by 29 any person, corporation, firm, partnership, joint stock 30 company, or any other association or organization of any 31 practices which that violate this chapter, or which that 32 may be necessary to restore to any person in interest any 33 money or property, real or personal, which that may have 34 been acquired by means of any practice in this chapter 35 declared to be unlawful.
- Actions for injunction under this section may be 37 prosecuted by the Attorney General or any district 38 attorney, county counsel, city attorney, or city prosecutor 39 in this state in the name of the people of the State of 40 California upon their own complaint or upon the

complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public. An action brought under this chapter seeking restitution or other 5 monetary recovery available under this chapter, other than an action brought by the Attorney General, a district attorney, a city attorney, or any other official of a governmental entity, shall be subject to Chapter 6 9 (commencing with Section 17300).

#### 10 Professions Code is amended to read:

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17200. As used in this chapter, "unfair competition" includes an unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 15 of the Business and Professions Code.

SEC. 2. Section 17500 of the Business and Professions Code is amended to read:

17500. It is unlawful for a person, firm, corporation or association, or any employee thereof directly or indirectly to intentionally dispose of real or personal property or to perform services, professional or otherwise, to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state or another state, in any publication, or in any other manner or means, any statement, concerning the real or personal property or services, professional or otherwise, or concerning any eircumstance or matter of fact connected with the proposed performance or disposition thereof, that is untrue or misleading, and that is known, or that by the 32 exercise of reasonable care should be known, to be untrue or misleading. It is also unlawful for a person, firm, or 34 corporation to make or disseminate or cause to be made 35 or disseminated any statement as part of a plan or scheme 36 with the intent not to sell the personal property or services, professional or otherwise, advertised at a stated price, or as advertised. A violation of this section is a misdemeaner punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding AB 1295 <u>-6</u>-

- 1 two-thousand five hundred dollars (\$2,500), or by both that fine and-imprisonment.

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